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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1977

NO. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF DELAWARE

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Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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OF THE STATE OF DELAWARE

Petitioner prays that a Writ of Certiorari issue to the Supreme Court of the State of Delaware.

A. The requested Writ is for review of the judgment of the Supreme Court of the State of Delaware reported at 373 A. 2d 578 (1977). A copy of this report is attached as Appendix A.

B. The jurisdiction of this Court is invoked on the basis that a right, privilege or immunity is claimed under the United States Constitution, and the decision in the Court below was against the right, privilege or immunity.

i. The judgment in the court below was made on April 29, 1977, and entered on May 2, 1977.

ii. No order respecting a rehearing nor any order granting an extension of time within which to petition for Certiorari has been granted.

iii. The statutory provision believed to confer jurisdiction on this Court to review judgment by Writ of Certiorari is 28 U.S.C. § 1257(3).

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C. The question presented for review is whether the Trial Court erred in refusing to hear testimony at a suppression hearing which would have shown to be untruthful certain allegations of an affidavit made in support of a search warrant.

D. The Constitutional provision which the case involves is the Fourth Amendment to the United States Constitution, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision is found in Volume 1, page XLVIII of the Official Edition.

The case further involves the Fourteenth Amendment to the United States Constitution, Section 1, which reads as follows:

> "All persons born or in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This provision is found in Volume 1, page XLIX of the Official Edition.

E. The Petitioner appealed his conviction of First Degree Rape, Second Degree Kidnapping, and First Degree Burglary, on the grounds that the Trial Court erred in refusing to hear certain testimony at a suppression hearing. The conviction was affirmed on appeal by the Delaware Supreme Court.

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who

forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant, and identified the Petitioner as the assailant.

A search warrant was obtained by the police and used to seize articles of Petitioner's clothing and a knife, which were introduced at trial over Petitioner's objection. The trial court refused to hear evidence offered at the suppression hearing to impeach the veracity of the affidavit used to establish probable cause for the issuance of the search warrant.

F. The federal question sought to be reviewed was first raised at a suppression hearing before trial. The Petitioner offered to produce testimony that would impeach the veracity of the affidavit used to establish probable cause for the issuance of the search warrant. The trial court refused to hear such evidence. The issue was raised and discussed at pages 4 to 31 of the trial transcript. A copy of this transcript is attached hereto as Appendix B.

G. The petitioner offers the following argument in support of allowance of the writ.

(1) THE INSTANT CASE PRESENTS A QUESTION OF SUBSTANTIAL SIGNIFICANCE THAT HAS NOT PREVIOUSLY BEEN DECIDED BY THIS COURT.

This Court, in Weeks v. United States[1] and Mapp v. Ohio[2], required the exclusion from federal and state courts, respectively, of evidence seized in violation of the Fourth Amendment to the U.S. Constitution. That Amendment prohibits "unreasonable searches" and declares that "...no warrants shall

[1] 232 U.S. 383 (1914).

[2] 367 U.S. 643 (1961).

issue, but upon probable cause, supported by oath or affirmation...". Extensive judicial consideration has been given to the allegations of an affidavit necessary to establish probable cause.[3] However, the extent to which a defendant may go beyond the face of an affidavit supporting a search warrant to challenge the accuracy of the representations in the affidavit is less well defined.

In accordance with Delaware practice and Rule 41(e) of the Federal Rules of Criminal Procedure, an aggrieved person may move to suppress evidence on the ground that there was not probable cause for believing the existence of the grounds on which the warrant was issued. Reason dictates that a determination of probable cause would involve the exploration of the accuracy as well as the sufficiency of the allegations in a supporting affidavit. However, many state courts have disallowed any challenge to the factual validity of an affidavit supporting a search warrant, and a number of federal courts have held that a finding of probable cause by a United States Commissioner is conclusive unless arbitrary, and thus not subject to challenge on the basis of the supporting affidavit's inaccuracy.[4] Other decisions, more in keeping with the fundamental purpose of the Fourth Amendment, indicate that

[3] Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Brinegar v. United States, 338 U.S. 160 (1949).

[4] Kennev v. United States, 157 F. 2d 442 (D. C. Cir. 1946); Gracie v. United States, 15 F. 2d 644 (1st Cir.), cert. denied, 237 U.S. 748 (1926); United States v. Gianaris, 25 F.R.D. 194 (D.D.C. 1960); United States v. Doe 19 F.R.D. 1 (E. D. Tenn. 1956)

"False facts given by the affiant will vitiate the warrant and the search."[5] Another held that it is for the reviewing court to decide "whether probable cause existed in this case independent of the...honest belief of the officer."[6]

Of those decisions which have denied the opportunity to challenge the truth and accuracy of the facts alleged in an affidavit, the reasoning supporting such holdings does not generally appear in the reported decisions. Typical is Tucker v. State of Maryland[7] in which the Court held simply that they were not persuaded that earlier cases were wrongly decided.[8] Foremost of these earlier cases was Smith v. State[9] in which the court, without elaboration, held

> "The better rule seems to be that the court's consideration of the showing of probable cause should be confined solely to the affidavit itself, and the truth of the alleged grounds cannot be controverted, as was done in the instant case, by receiving the testimony of the accused and other witnesses."[10]

While this Court, in earlier decisions including Weeks and Mapp[11] has provided clear guidance regarding probable cause, it has not yet ruled on the question presented by the instant case. The Court has even gone so far as to suggest the importance of its resolution, saying

> "This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavits establish 'probable cause'."[12]

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[5] King v. United States, 282 F. 2d 398, 400 (4th Cir. 1960).

[6] United States v. Henderson, 17 F.R.D. 1 (D.D.C. 1954).

[7] 224 A. 2d 111 (1966).

[8] Ibid., page 118.

[9] 191 Md. 329, 62 A. 2d 287, cert. den. 336 U.S. 925, 69 S. ct. 656 (1949).

[10] Ibid. 62 A. 2d 289.

[11] supra notes 1 and 2.

[12] Rugendorf v. United States, 376 U.S. 528 (1964).

In view of the present uncertainty by lower courts in the administration of Fourth Amendment rights, the Supreme Court's consideration and guidance on this issue is urgently needed.

(2) JUDICIAL REVIEW OF THE TRUTH OF AN AFFIDAVIT SUPPORTING A SEARCH WARRANT IS ESSENTIAL TO GIVE MEANING TO THE FOURTH AMENDMENT GUARANTEES.

a. IF A DEFENDANT IS DENIED THE OPPORTUNITY AT TRIAL TO SHOW THAT ALLEGATIONS OF A SEARCH WARRANT ARE FALSE, THERE IS NO OTHER OPPORTUNITY IN THAT CRIMINAL PROCEEDING TO ASSERT HIS FOURTH AMENDMENT RIGHTS.

Our judicial system is based on the wisdom and inherent fairness of an adversary proceeding; one in which both parties in interest have the opportunity to present their case to an impartial trier of fact. The concept of a final ex parte proceeding was so repugnant to the framers of our Constitution that they included specific prohibitions against bills of attainder[13] that had been so cruelly misused in the past.

The initial hearing for the granting of a search warrant is necessarily an ex parte proceeding. Prior notice of a hearing regarding the initial granting of a search warrant would undoubtedly result in the removal or destruction of evidence. In this ex parte proceeding, however, a judicial determination is made regarding probable cause. The Constitution requires that there be probable cause. This necessarily means that the granting of the search warrant entails a determination of both the sufficiency and accuracy of the allegations in the application. The suppresssion hearing is the first opportunity that the defendant has to present evidence in this matter.

Without complete review of the original determination at a suppression hearing, the accuracy of the allegations supporting the search warrant originally issued would never be

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[13] United States Constitution, Article I, § 9.

considered in an adversary situation. The defendant would never have the opportunity to present, for judicial determination, evidence negating that presented by the State about the accuracy of these allegations. It is submitted that such a situation is contrary to our adversary judicial system and a fundamental concept of fairness.

b. THERE ARE NO SATISFACTORY ALTERNATIVES TO AN ADVERSARY DETERMINATION OF PROBABLE CAUSE AT A SUPPRESSION HEARING.

It has been suggested that a defendant has a remedy against an officer who makes untruthful statements to support a search warrant, in that a criminal action for perjury or civil action for damages are available. However, this Court considered and rejected such arguments many years ago. Then, in reviewing whether it is necessary to exclude evidence obtained without a search warrant, Mr. Justice Black said, in Mapp v. Ohio,

> "There are, of course, other theoretical remedies. One is disciplinary action with the hierarchy of the police system, including prosecution of the police officer for a crime. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates ordered."[14]

A civil action would seem to be a curious solution to this problem. Suppose, arguendo, that the defendant did bring a civil action against a police officer for damages resulting from the officer's willful misrepresentations in seeking a search warrant. Suppose further that the defendant convinced a jury of his case, and was awarded substantial damages as a result. Reopening the criminal action would clearly be dictated. If these circumstances would warrant reconsideration of the original criminal charges, it is submitted that the interest of justice would be best served if these inquiries were made in the initial criminal proceedings.

[14] supra, note 2.

c. THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES IS HOLLOW INDEED IF IT PERMITS THE POSSIBILITY OF EITHER NEGLIGENT OR INTENTIONAL MISREPRESENTATIONS IN SUPPORT OF A SEARCH WARRANT WITHOUT JUDICIAL REVIEW.

Over sixty years ago, this Court considered whether it was constitutionally permissible to introduce evidence obtained without a search warrant. Mr. Justice Day then concluded that if materials so obtained could be "used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and...might well be stricken from the Constitution."[15]

Is there a difference between evidence obtained without a search warrant and evidence obtained with a search warrant that was granted on the basis of negligent or intentional misrepresentations? If there is a difference, we submit that the latter situation does greater violence to the Constitution of our nation. We might sympathize with an officer who enters without a warrant on the certain belief that the fruits or instrumerts of a crime lie within. How can we excuse, however, the officer who would willfully or negligently fabricate an allegation to obtain a search warrant? Without a mechanism to guard against such abuse, our Fourth Amendment rights would very well be "of no value, and might well be stricken from the Consitution."

(3) THE EVIDENCE INTRODUCED IN VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS SIGNIFICANTLY PREJUDICED HIS CAUSE.

In the application for the search warrant issued on March 9, 1976, eighteen facts were alleged to establish probable cause. Of those eighteen facts, it is submitted that only three, Nos. 15, 16 and 17, would provide basis for the belief that physical evidence connected with the crime might be found

[15] Weeks v. United States, supra, note 1.

in the searched premises. These three statements were based on alleged conversations with Mr. James Williams and Mr. Wesley Lucas. The defendant had, at the suppression hearing in the court below, offered to produce evidence that no such conversations took place. Accordingly, the court's refusal to hear such evidence bore on issues central to the sufficiency of the affidavit supporting the application for a search warrant.

As a result of the search carried out pursuant to the warrant in question, a knife and several articles of clothing were discovered which generally corresponded to the description of these items by the victim. At trial, they represented the only tangible evidence submitted to the jury. In view of this central role of the evidence at the trial, the violation of defendant's right against unreasonable searches and seizures can be rectified only by a new trial excluding the tangible evidence obtained as a result of this search.

(4) CONCLUSIONS

It is respectfully submitted that if the Fourth Amendment is to succeed in its stated purpose of protecting the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...," a review of the validity of an affiant's allegations in addition to their sufficiency is required, in accordance with carefully reasoned opinions such as King v. U.S.[16] in which the court concluded, "The constitutional requirement of an oath or affirmation would be effectively eroded away if fictitious oaths were permitted."[17]

Innocent misrepresentations, to the extent that an affiant believed the misrepresentations to be true, do not do violence to the Fourth Amendment. However, it is respectfully

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[16] 282 F. 2d 398 (1960).

[17] Ibid., page 399.

submitted that every material misstatement made either intentionally or negligently by an affiant should require exclusion of the evidence obtained as a result of such misstatement. Such exclusion is necessary to deter such intentional or negligent misstatements to adequately preserve the constitutionally guaranteed rights against unreasonable searches and seizures.

In view of the importance of the issues presented in this case and the absence of earlier instruction by the Court, granting of the Writ of Certiorari is indicated.

H. A copy of the Opinion of the Supreme Court of the State of Delaware delivered upon rendering of Judgment sought to be reviewed is appended hereto as Appendix C. Included in this Opinion is the judgment or decree in question.

In view of the foregoing, the issuance of a Writ of Certiorari is earnestly solicited.

Respectfully submitted,

Donald W. Huntley

Donald W. Huntley

Counsel for Petitioner

APPENDIX A

Franks v. State of Delaware decision as reported at 373 A. 2d 578.

about escape or removal of anything to be searched for. We also note that there was no factual basis for the search during the night under the circumstances shown in this record. Defendant was in custody of the police (on a disorderly conduct charge) when eight police officers descended on his trailer home at 11:30 P.M. while only his wife was there. Nothing whatever appears in this record to justify that intrusion.

[5, 6] It follows from this analysis that all evidence seized during the course of the search must be suppressed. This includes the Bearcat Scanner which was the principal target of the warrant. The scanner was noticed earlier in the day by a police officer while he was in defendant's trailer executing the arrest warrant for disorderly conduct. The officer recorded the serial number and subsequently ascertained that the scanner was stolen. It was seized during the search in issue here.

As to this piece of evidence, it is necessary to distinguish between its discovery and subsequent seizure. The discovery was not unlawful or tainted since it was in plain view of the Trooper who was lawfully present in defendant's trailer at the time of observation. But not so as to the seizure. The propriety of the seizure turns on the legality of the entry into the trailer at the time of seizure. And because the police were without authority to enter defendant's home during the night, it follows that they were without authority to seize the scanner *at that time*.[3] We conclude, therefore, that the scanner is a fruit of an unlawful search and seizure and, accordingly, must be suppressed. *Pierson*, supra at 574.

The judgment of the Superior Court is reversed and the case remanded for proceedings consistent herewith.

Jerome FRANKS, Defendant Below, Appellant,

v.

STATE of Delaware, Plaintiff Below, Appellee.

Supreme Court of Delaware.

Submitted March 16, 1977.

Decided April 20, 1977.

Defendant was convicted before the Superior Court of first-degree rape, second-degree kidnapping, and first-degree burglary, and he appealed. The Supreme Court, McNeilly, J., held that no attack upon veracity of underlying affidavit establishing probable cause for search warrant which was not attacked on its face could be made by defendant at suppression hearing.

Affirmed.

1. Searches and Seizures ⇐3.9

No attack upon veracity of underlying affidavit establishing probable cause for search warrant which was not attacked on its face could be made by defendant at suppression hearing in prosecution for first-degree rape, second-degree kidnapping and first-degree burglary; matters asserted by defendant were more properly considered at trial on merits. U.S.C.A.Const. Amend. 4; 11 Del.C. §§ 764, 783, 826.

2. Searches and Seizures ⇐3.5

It is function of issuing magistrate to determine reliability of information and credibility of affiants in deciding whether requirement of probable cause for issuance of search warrant has been met. U.S.C.A. Const. Amend. 4.

3. Criminal Law ⇐394.6(3)
Searches and Seizures ⇐3.5

Neither probable cause nor suppression hearings are adjudications of guilt or innocence.

3. To support the validity of the seizure, the State asserts the well established "plain view doctrine." However, this is not helpful to the State since an essential element of the doctrine is lacking, namely, the police were not lawfully present in the trailer at the time of seizure of the scanner. *Miller v. State*, Del.Supr., 310 A.2d 867, 869 (1973).

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Upon appeal from Superior Court. Affirmed.

Donald W. Huntley, Asst. Public Defender, Wilmington, for defendant below, appellant.

Harrison F. Turner, Deputy Atty. Gen., Dover, for plaintiff below, appellee.

Before HERRMANN, C. J., and DUFFY and McNEILLY, JJ.

McNEILLY, Justice:

Defendant appeals his conviction by a Superior Court jury of first degree rape, 11 *Del.C.* § 764,[1] second degree kidnapping, 11 *Del.C.* § 783,[2] and first degree burglary, 11 *Del.C.* § 826,[3] contending that the Trial Court erred in refusing to hear impeachment testimony at a suppression hearing. We disagree.

I.

According to the victim, she was confronted in her home, at about 5:00 a. m., by a knife-wielding assailant who forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant and identified defendant as the assailant.

A search warrant was obtained by the police and used to seize articles of defendant's clothing and a knife, which were introduced at trial over defendant's objection. The Trial Court refused to hear evidence offered at the suppression hearing to impeach the averments of the affidavit used to establish probable cause for the issuance of the search warrant.

At trial, defendant did not deny that he had had intercourse with the victim, asserting the defense of consent.

II.

[1-3] Defendant contends that the Trial Court erred in refusing to hear testimony at the suppression hearing which would have impeached the affidavit establishing probable cause for the search warrant; that this violated the Fourth Amendment prohibition against unreasonable searches and seizures and the requirement that no search warrant shall issue but upon probable cause, supported by oath or affirmation. There is no attack upon the validity of the warrant on its face, and the United States Supreme Court has left open the extent to which a supporting affidavit may be challenged for accuracy. *Rugendorf v. United States*, 376 U.S. 528, 531-32, 84 S.Ct. 825, 827-28, 11 L.Ed.2d 887, 891 (1964). The majority of the jurisdictions considering this question have decided that no attack upon the veracity of an underlying affidavit may be made.

1. 11 *Del.C.* § 764 provides:
"A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and
"(1) In the course of the offense he inflicts serious physical, mental or emotional injury upon the victim, or
"(2) The victim was not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact."
"Rape in the first degree is a class A felony."

2. 11 *Del.C.* § 783 provides:
"A person is guilty of kidnapping in the second degree when he unlawfully restrains another person with any of the following purposes:
"(1) To hold him for ransom or reward; or
"(2) To use him as a shield or hostage; or
"(3) To facilitate the commission of any felony or flight thereafter; or
"(4) To inflict physical injury upon him, or to violate or abuse him sexually; or
"(5) To terrorize him or a third person;
and the actor voluntarily releases the victim alive, unharmed, and in a safe place prior to trial."
"Kidnapping in the second degree is a class B felony."

3. 11 *Del.C.* § 826 provides:
"A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, he or another participant in the crime:
"(1) Is armed with explosives or a deadly weapon; or
"(2) Causes physical injury to any person who is not a participant in the crime."
"Burglary in the first degree is a class B felony."

A-2

See 68 Am.Jur.2d *Searches and Seizures* § 66 (1973). We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits. See *State v. Petillo*, 61 N.J. 165, 293 A.2d 649 (1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1388, 35 L.Ed.2d 611 (1973); *Carter v. State*, 274 Md. 411, 337 A.2d 415 (1975).

Because of the resolution of this issue there is no need to consider defendant's other contentions, relating to the evidence that would have been introduced for impeachment purposes.

Affirmed.

George R. CANNON, Plaintiff,
v.
The DENVER TRAMWAY CORPORATION, Defendant.

Court of Chancery of Delaware, New Castle.

Submitted Oct. 10, 1976.
Decided Jan. 5, 1977.
Reargument Denied Jan. 24, 1977.

Trustee in dissolution of dissolved corporation sought instructions from court as to an appropriate distribution of corporate funds over and above amounts required to pay corporate obligations. The Court of Chancery, in and for New Castle County, Marvel, Chancellor, held that under dissolved corporation's plan of liquidation, court order creating office of trustee, document transferring assets from the corporation to the trustee, and trustee's declaration and acknowledgment, which provided for trustee to hold all funds for benefit of stockholders, legal title to assets was to be held by trustee while beneficial interest was to rest with former shareholders and, thus, income earned by investment of fund would be allocated among former stockholders in proportion to their equitable interest therein and preferred stockholders would be entitled to receive same compound interest which had been received by trustee as a result of his investment of trust funds.

Order to be presented.

1. Corporations ⇐629

Under dissolved corporation's plan of liquidation, court order creating office of trustee, document transferring assets from the corporation to the trustee, and trustee's declaration and acknowledgment, which provided for trustee to hold all funds for benefit of stockholders legal title to assets was to be held by trustee while beneficial interest was to rest with former shareholders and, thus, distribution of sum representing interest income earned on assets of dissolved corporation in hands of trustee would be allocated among all former stockholders in proportion to their equitable interest therein, notwithstanding rule of law that preferred shareholders are limited upon dissolution to contractual preference set forth in their corporation's certificate of incorporation and therefore are not entitled to participate in distribution of residue of corporate assets to common shareholders after payment of liquidation preferences.

2. Trusts ⇐173

Trustee must deal impartially with several beneficiaries of a trust.

3. Corporations ⇐629

Duty of trustee of dissolved corporation to maintain reserves for contingent liability would not militate against fact that in a liquidation receivership the actual own-

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APPENDIX B

Pages 4-31 of the Trial Transcript

but we will take a five-minute recess at this time.

(A recess was here taken.)

Courtroom No. 2
11:20 o'clock a.m.
The same day.

PRESENT: As before noted.

THE COURT: The State of Delaware versus Jerome Franks, motion to suppress. Mr. Finocchiaro, you may proceed.

MR. FINOCCHIARO: Your Honor, first of all I would ask witnesses be sequestered during this hearing.

THE COURT: You may step outside in the hallway.

(The witnesses left the courtroom.)

MR. FINOCCHIARO: Initially, the Defense would like to call Detective Brooks to the stand.

THE COURT: Isn't this a motion to suppress the search warrant because it was not sufficient?

MR. FINOCCHIARO: Yes, Your Honor.

THE COURT: Then we are arguing about the contents of the search warrant, are we not?

MR. FINOCCHIARO: That is correct, Your Honor. I intend to produce testimony along those lines.

THE COURT: What is the need for testimony is

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the next question if we are talking about whether the search warrant is sufficient?

MR. FINOCCHIARO: Your Honor, I have two particular reasons.

THE COURT: We are putting this on the record. We have discussed it the other day.

MR. FINOCCHIARO: I question the validity of certain of these points stated in the preliminary hearing -- I'm sorry. I question the validity of some of the points made in the affidavit in this case that was involved in issuing the search warrant and, in addition, I question whether or not there was a prior potential violation of Mr. Franks' right whereby the fruit of the poisonous tree aspect may apply.

THE COURT: Anything further?

MR. FINOCCHIARO: They are the points, Your Honor, that I have. I intend to produce witnesses along these lines.

THE COURT: Is the search warrant in the file?

MR. FINOCCHIARO: I don't know if it is in your file or not, Your Honor.

THE COURT: It is not attached to your motion.

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MR. FINOCCHIARO: Apparently not.

THE COURT I cannot rule upon it unless I can have it.

MR. FINOCCHIARO: The only copy I have, Your Honor, does have various notes made by me. I don't know if the Attorney General would have an unmarked one or not.

MR. TURNER: I have just one copy, but I would be glad to furnish it to the Court. Both the Court and I can use it I guess. I would like to respond if I may.

THE COURT: Let me see if I can make it clear. You feel certain matters in the motion to suppress are not correct and you wish to present evidence to show they are not correct.

MR. FINOCCHIARO: Yes, Your Honor. I believe a good portion of the information obtained in this affidavit is totally irrelevant to issuance of a search warrant and certain factors that were relied upon, I would say the stronger factors, some of them are incorrect and that there was misrepresentations made in the affidavit.

Further, another particular comment in Paragraph No. 8. I question whether or not there may have been any prior violations of Mr. Franks' rights such that whatever information they obtained, if it was obtained

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unconstitutionally, could not be used as subsequent probable cause in the issuance of the search warrant.

MR. TURNER: May it please the Court. In response, may I point out that initially in the ruling upon the search warrant our Supreme Court has stated in Pearson vs. State that sections 2306 and 2307 of 11 Delaware Code, like Federal Criminal Rule 41e contemplate a "four corners" test for probable cause. Sufficient facts must appear in the face of the affidavit so Magistrate's personal knowledge, notwithstanding a reviewing court, can verify the existance of probable cause. Thus, one looks only to the facts recited in the Complaint.

Thus, this is the interpretation that our Supreme Court has stated with respect to probable cause, looking only to the facts recited in the Complaint. You have a four corners test.

Now, as to Mr. Finocchiaro's wanting to call witnesses, may I refer the Court to first of all 68 AmJur 2nd Page 720. The Supreme Court --

THE COURT: Let's complete the record. What witnesses do you wish to call, and would you make a proffer of what they will testify to, Mr. Finocchiaro?

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MR. FINOCCHIARO: Yes, Your Honor. Would you like for me to limit myself -- or, first of all I will address what Colonel Turner has stated.

THE COURT: Not yet. Why don't you make your proffer and then we can delineate the issues.

MR. FINOCCHIARO: Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center and Mr. James Morrison, formerly of the Delaware Youth Center, who I believe will give information that will intend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.

THE COURT: That would be of what paragraph? Paragraph 15?

MR. FINOCCHIARO: Yes, Paragraphs 15, 16 and 17.

THE COURT: And what they would testify to would rebut what is in Paragraph 15, 16 and 17.

MR. FINOCCHIARO: Would rebut not only certain

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factual matters, but also as to whether or not it was given and to whom it was given and in addition in Paragraph number 8 --

THE COURT: In other words, they will say that none of that information was given?

MR. FINOCCHIARO: They will testify that neither one of them to the best of their knowledge gave this information to either of the affiants contained in this affidavit, and additionally that the information that they did give was somewhat different than contained in the affidavit and was not to an officer who even swore out the affidavit and that what was stated in there is not an accurate representation of precisely what they said.

THE COURT: So will you have other witnesses?

MR. FINOCCHIARO: Yes. I also intend to call Officer McClements of the Dover Police Department in reference to Paragraph No. 8. I feel that there should be a showing of absence of taint because I think the case law is clear that if something is obtained in violation of constitutional rights that cannot be used later to show probable cause in the issuance of a search, of an arrest or a search warrant, and basically then I

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would possibly or potentially produce testimony of Mr. Franks. But they are the witnesses I would like to call. In addition I would like to call Detective Brooks.

THE COURT: What is your proffer of Mr. Franks?

MR. FINOCCHIARO: Mr. Franks will dispute some of those factors in there.

THE COURT: Which factors?

MR. FINOCCHIARO: Well, let me put it this way, Your Honor. I do not know what Officer McClements will testify to. His proffer will depend on the testimony of Officer McClements. I do not know whether he would agree or disagree with what he has to say.

THE COURT: You want to call Officer McClements, I presume, as a hostile witness, to examine him as to the contents of Paragraph No. 8?

MR. FINOCCHIARO: That is correct.

THE COURT: Now, we have delineated exactly what the Defendant intends to proceed on here.

MR. FINOCCHIARO: And, Your Honor, one additional point, I would anticipate calling Detective Brooks to question him as to the comments that he made in Paragraphs 15, 16 and 17, and I would also, as previously mentioned,

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cal. both Mr. Morrison and Mr. Lucas in that same regard.

MR. TURNER: I will first approach this problem from the standpoint of whether Mr. Finocchiaro is entitled to call any witnesses.

As I have pointed out on probable cause, Pearson vs. State is the latest case on that and I have already recited that. It is to be based on the four corners.

Now, the motion we have before us is in connection with suppression which Mr. Finocchiaro has enlarged upon that. He wants to test the validity of the statements in the affidavit.

I would like to refer the Court to the pertinent authority first, and I start off with 5 ALR 2nd Page 396. In absence of a statute the general rule basically -- Delaware has no statute which would embrace this particular area. The cases involving the problem under annotation exhibit a number of different ways by which the question is actually presented to the appellant courts. All proceed on the assumption that after execution of the search warrant criminal proceedings have been brought.

A motion to quash the search warrant is one of

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the ways of attacking.

I come to the key involving these various methods of raising the question, exhibiting the different specific challenges to the matter. In the supporting affidavit or complaint mentioned are a large number of decisions which represent an overwhelming majority of the cases decided apart from applicable statutes supporting the view that the matters contained in an affidavit or verified complaint on which a search warrant is based may not be questioned or disputed by the person against whom the warrant is directed. Citations on that: Illinois, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Oklahoma -- many cases under each -- Rhode Island, Tennessee, Texas, Washington, throughout the entire jurisdiction.

One particular case that comes to my attention, it is a Maryland case, Tucker vs. State 224 A. 2nd 111 certiorari denied, 386 U.S. 1024.

The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself and the truth of the alleged ground stated in the affidavit cannot be

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controverted by receiving the testimony of the accused and of the witness. As I have said in Pearson vs. State one only looks to the facts recited in the affidavit in support of the search warrant.

I now pass to 68 AmJur 2nd at page 625. The Supreme Court of the United States has not directly passed upon the question as to the extent to which a court may permit an attack upon the supporting affidavit for a search warrant where the warrant is valid on its face and the allegations of the affidavit, assuming them to be true, establish probable cause.

Rugendorf vs. the United States, 376 U.S. 528 held that even if such attack is proper it cannot be based on factual inaccuracies which are of only peripheral relevancy to showing of probable cause and which do nothing to the integrity of the affidavit.

A majority of the state courts which have considered the problem have held that in the absence of statute the matters contained in an affidavit in which the search warrant is based may not be disputed by the person against whom a warrant is directed for the purpose of showing the invalidity of the warrant. Citations:

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PAGE A – 14 WAS NOT AVAILABLE AT THE TIME OF FILMING; HOWEVER, IT IS REPRINTED IN FULL IN THE SEPARATE APPENDIX.

ground that, one, the property was illegally seized without warrant which doesn't apply here or, four, there was not probable cause for believing the existance of the ground upon which the warrant was issued. There is the difference. Therefore, the Federal courts and certain cases have considered whether or not testimony could be taken in support of the affidavit.

The 4th, 6th, 7th and 8th Circuits, which I have the cases here: the 7th Circuit, United States vs. Carmicheal 489 F. 2nd 983, 1973; the 6th Circuit, United States vs. Luna 525 F. 2nd 4 1975; the 4th Circuit, United States vs. Lee 19 Criminal Law 2193, just decided in May; the 8th Circuit, United States vs. Marehart 492 F. 2nd 897. These Circuits all agree that only the deliberate inclusion of false statement or wreckless inclusion of false statement material to the establishment of probable cause. They take into consideration: Did the officer intend to deceive the magistrate? If such is so, then and there must be a showing of such before even a hearing is awarded.

The 5th Circuit and the 2nd and 1st Circuits: 5th Circuit in United States vs. Thomas 489 F. 2nd 664 also includes the misstatement with the intent to deceive

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the magistrate must be involved.

Now, these cases are analyzed under United States vs. Lee which appears in 16 Criminal Law at page 2311 entitled: Search Warrant Challenges the Truthfulness of Supporting Affidavit. They analyzed these cases.

However, I am pointing out that even in the Federal where it is much stricter than what Mr. Finocchiaro tries to do here today, much stricter, they are still interpreting a different Rule 41e which we don't have.

I reiterate again all State courts, majority of State courts that have considered this question, have decided that you cannot go behind the affidavit. The Maryland court, which I have just cited as the most recent case in the nearest jurisdiction, but the jurisdictions which have ruled upon this are numerous, and as I quote from the authorities they have stated that you cannot go behind the truth of the warrant.

One case stated it just may not be disputed upon the facts that exist in the search warrant; therefore the State would contend that the only thing before this Court, both by the motion of the Defendant and by case law, is to decide on the four corners of this search

warrant application and the affidavit, whether it establishes probable cause and under these considerations I submit to the Court that under United States vs. Ventresca the Court must read the search warrant as a practical and not an abstract thing.

They must be tested and interpreted by the Magistrate Court in a common sense and realistic fashion. This is taken from United States vs. Ventresca 380 U.S. 102.

Quoting from Jones vs. United States 362 U.S. 257, 260, "A warrant must be looked at from a reasonable fashion." In that particular case they admit it. Affidavits are not drawn by lawyers but only by policemen not educated under the stress of need, and not educated as an attorney and they must be looked at realistically in order to arrive at whether or not probable cause has been established.

Under those circumstances I submit to the Court that the four corners of this warrant are the only thing to be considered at this time and the Court must consider and find probable cause is established by the warrant.

THE COURT: So he is calling his first witness. You are in effect objecting to the relevancy of the proposed witness?

MR. TURNER: I am objecting to his going behind it in any way. I am stating that before the Court is a motion which it must decide on the four corners as indicated by Pearson and that is it.

MR. FINOCCHIARO: Your Honor, first of all the State has mentioned the use of the four corners test. I think that goes to an entirely different factor than what we have presented here.

I think the four corners test questions whether or not there can be, the affidavit can be supplemented by material presented to the Magistrate. In other words, supplemented orally, matters not contained in it, and the Court as a matter of practical necessity said that is ridiculous. Quite simply, how can we review, a higher court review what was said if it was only said orally? We must go by the affidavit.

This I feel is an entirely different aspect and as such it is not controlled by the four corners test at all and this point, as previously indicated, goes

whether I, the Defense, may present evidence not presented to the Magistrate that impeaches the representation of the affidavit.

I would like to bring to the Court's attention the United States Supreme Court case: North Carolina v. Renzi, June 17, 1974. It was for a petition for a writ of certiorari which was denied. In an opinion by Justice White he denied the writ for certiorari and went on to say, on the second page of that opinion on 94 Supreme Court Reporter 3182, "Whether a search warrant and supporting affidavit are adequate on their face may later be impeached is squarely presented here. The time is ripe for decision on this question for the courts are in conflict and the question is important for the proper administration of criminal justice." Unfortunately, Justice White did not go on to decide that particular question that I am aware.

He also points out in this, the United States Supreme Court case of Rugendorf vs. United States which does leave the question unsettled, but there it was talking about issues of peripheral relevancy.

I would also like to point out that some of

the cases cited indicate that -- Steele vs. United States 267 U.S. 498 I feel can be interpreted to indicate the challenger may present evidence although Rugendorf as previously mentioned does treat the matter as unsettled.

North Carolina vs. Renzi previously mentioned does collect the views and indicates there is a vast disagreement among the states. It is ripe for consideration, it is ripe for decision. It has not been so and apparently, to the best of my research and apparently for the State's, for that matter has not been determined by this State.

Further, I think we are not talking about a matter of peripheral relevance here. The affidavit indicates that personal information, personal contact was made with certain witnesses and certain information was obtained. I intend to produce evidence that the person who said that did not personally contact those individua at all, and I think this is not dealing with peripheral relevancy. As such, I feel that there may have been at least some misrepresentation to the Magistrate from wha I have been told that in fact they didn't even contact that person. They may have had some other information

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a little bit different, but obtained through another police officer and they learned of it, but nevertheless apparently a misrepresentation to the Magistrate in the court below and I don't feel that is dealing with the peripheral relevancy.

I think any magistrate would be extremely upset if a police officer gave him an affidavit and it turned out later that officer did not obtain that information personally like the way he said it was. And, in addition, like I said, I think this issue is ripe at this time. I am taking the words of Justice White in that matter.

Further, I feel we have an additional problem here and that is that if the information obtained in Paragraph No. 8 was obtained in violation of constitutional rights that that should not later be used as probable cause to be used in the issuance of a search warrant. Since this matter has not been presented, I question whether this court can merely say: Well, if some courts do not allow it and some courts do I will merely go by the majority without some type of independent evaluation by this court, and I feel that since we are not talking

about peripheral relevancy, but basic misrepresentation, this court should hear this testimony and make a decision on it.

MR. TURNER: I would like to answer that briefly. Just because Justice White has stated it is time for the Supreme Court of the United States to decide this case, it seems to me to be putting a hell of a burden on this court to step in and do what the Supreme Court has not.

In the Harvard Law Review article that I cited, it states, "It is deplorable at this late date. The law is in the state of confusion of whether the validity of the search warrant affidavit may be challenged. Motions to suppress evidence are made daily in trial courts, state and federal, with the law so unsettled results vary from judge to judge. Respect for the judicial process must suffer. The time is ripe for the Supreme Court to clarify this important question."

In Rugendorf the Court assumed arguendo that such a challenge was available. Due respect for the fourth amendment protection against unreasonable searches should lead the Court now to give its assumption

the dignity of a firm holding.

In other words, this Law Review Article which is quite comprehensive states that it is ripe. Justice White states it is ripe, but nevertheless it hasn't been decided.

In the meantime, all State courts throughout the entire country, the jurisdictions have stated that it is not subject to attack and the various authorities on this case state that as I stated to you from AmJur 2nd, as I stated from 5 ALR 2nd. They are taking the cases in the different jurisdictions and they find the State courts have universally almost, there are a few isolated occasions where they have allowed it in, but the universal: No.

Now, the mere fact it might be ripe for decision in the Supreme Court of the United States should have no bearing on this court sitting here.

It is the contention of the State that this court should follow those lines or cases which are by far the majority view and under those circumstances the testimony is not admissible in connection to test the validity of the warrant.

I might state that Mr. Finocchiaro is arguing

about peripheral and nonperipheral which is taken from Rugendorf which approach the question, but did not decide it. So it is still up in the air. So whether it is peripheral or not is still beside the point.

The point is whether he can introduce testimony, and with all the state jurisdictions ruling against it I feel that this court would join the majority rather than the distinct and definite minority.

MR. FINOCCHIARO: Your Honor, if I may briefly respond. First of all, Colonel Turner made one statement which I think he later altered slightly. I think he said all courts have said that it is not, cannot be challenged and I think he has indicated it is a majority. That is apparently incorrect. There are states that will allow the court or allow the Defendant, as the case may be, to challenge the affidavit. Included among those cases are: Alabama, California, New York and Pennsylvania and initially when he made the statement "all" apparently Delaware has not ruled on this issue and I don't think the court can merely toss a coin and say: If it is six to five or ten to five, whatever the case may be, then therefore that is the proper course to follow without

some type of independent evaluation. But I would like to go on.

Let me say that basically what I am indicating is not only a factual discrepancy, but I would say that there has been some type of misrepresentation as to what that police officer personally learned and related to the Magistrate, and I think that does make a stronger case where there is some type of bad faith or misrepresentation, and I am basing this solely on the information that is provided me by my witnesses. I have not talked to Detective Brooks about this. I don't know what his position is, but nevertheless I feel this issue is ripe.

I think Colonel Turner has indicated that and I don't think this court, where it has never been addressed to this court, can merely indicate if other states do it that way I would just go by the majority and disregard the minority and handle it in that fashion.

MR. TURNER: Most of those minority states have statutes which are invoked.

THE COURT: I am going to sustain the State's objection. You may proceed.

MR. FINOCCHIARO: Your Honor, I would like to

make a witness proffer if the Court would be allow.

THE COURT: You have already made a proffer.

MR. FINOCCHIARO: That is a lawyer proffer. I would like to make a witness proffer.

THE COURT: What is the difference.

MR. FINOCCHIARO: Well, I think they would perhaps state a little bit more emphatically.

THE COURT: Have the witnesses come in and tell us?

MR. FINOCCHIARO: Yes. I made my proffer, Your Honor, but I would still like to make a witness proffer.

MR. TURNER: May I suggest the Court has just ruled that that is exactly what it can't do.

THE COURT: All right. That is denied. Proceed.

MR. FINOCCHIARO: Your Honor, you have ruled apparently that regardless there is factual inaccuracies or misrepresentations in here that I am not allowed to challenge it. Nevertheless, I still question if your ruling goes to the effect that if there was a violation of Mr. Franks' rights, and I am talking in reference to Paragraph No. 8, and as such is tainted evidence, whether

...not the Court is going to allow me to examine whether or not there was any taint. In other words, whether or not it should be excluded from the search warrant. Perhaps I should repeat that.

In addition to my other argument there may be inaccuracies or misrepresentations, I feel that perhaps in reference to Paragraph No. 8 there may have been a violation of Mr. Franks' constitutional rights. I feel that evidence was tainted and that it should not be used as probable cause in the later obtaining of a search warrant.

I don't know if your ruling has precluded me from that also.

MR. TURNER: As I understand it, we are now at the position where the Court is about to decide the validity of the search warrant on the four corners; therefore, that issue seems to be the only one before the Court.

THE COURT: I presume he has some further comments as to Paragraph No. 8 in which I presume Mr. Finocchiaro was saying this was not argued and he wishes to present argument on Paragraph No. 8 as to facts. You wish to present evidence to show that the information

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...tained in Paragraph No. 8 was obtained in violation of Defendant's constitutional rights.

MR. TURNER: Isn't he going back beyond the search warrant in that case to establish the validity of these things which, as I understand it, we have just finished arguing? The Court has made its ruling. Is the Court going to allow him to go back and present testimony as the validity of the search warrant?

It is my understanding we are here on a suppression hearing. It is my further understanding that we have argued as to whether he can go back and present testimony as to the validity of those items in the search warrant. It is my further understanding the Court has ruled against it.

Now, we are at the position where, as I see it, before the Court is now the search warrant for decision as to whether it establishes probable cause without the necessity or actually the permission to call witnesses.

THE COURT: Is there additional argument you wish to make as to Paragraph No. 8 that you have not made?

MR. FINOCCHIARO: Yes, Your Honor.

point out in a little bit more detail precisely
hat my position is. In other words, I am stating
that if the statement that was made, contained in Paragraph
, I was unconstitutionally obtained that is perhaps in
violation of Miranda rights or voluntariness standard
or whatever constitutional rights referring to it is
tainted evidence and that may not be used to support a
subsequent probable cause to determination of the issue
of the warrant.

THE COURT: You have indicated you have not argued this point before?

MR. FINOCCHIARO: Your Honor, I preface this by saying I do not know if your ruling takes this under its umbrella if you will.

THE COURT: The answer is yes.

MR. FINOCCHIARO: In other words, your ruling is that regardless of any factual inaccuracies or misrepresentations, that if there is unconstitutionally obtained evidence that may be used to obtain a search warrant? Is that what your ruling is, Your Honor? In other words, I have case law which I think seems to indicate to the contrary.

MR. TURNER: I think all the Court has ruled is that they can't go behind the search warrant without making any ruling about constitutional, unconstitutional or anything else. It is just the Defendant is barred from going behind the search warrant.

THE COURT: That is correct.

MR. FINOCCHIARO: Your Honor, there are cases after cases which talk about an illegal search and then goes on to determine that what was found during that illegal search cannot be used as probable cause for a subsequent search. Now, how can you determine that the second search was invalid unless you look and determine what the first search was and that is the problem that I am faced with this morning.

MR. TURNER: There is no previous search that I know of.

MR. FINOCCHIARO: I am talking about case law, talking about fourth amendment, fifth amendment. I think the argument is equally applicable.

THE COURT: Anything further, counsel?

MR. FINOCCHIARO: I have nothing further, Your Honor.

MR. TURNER: I think the Court has already ruled.

THE COURT: Nothing further on the merits of the search warrant?

MR. FINOCCHIARO: I am sorry, Your Honor. My comments were just limited to my argument as to whether or not I could show factual inaccuracies or misrepresentations or whether I could show unconstitutionally obtained evidence should not be used as probable cause in the later issuance of the search warrant. Since the Court apparently has denied my motions in both of those areas I would like to review this search warrant very basically with the Court.

I would say that perhaps the entire portion of this affidavit is totally irrelevant to the issue at hand. Paragraph No. 1 talks about a Brenda Bradley. I feel that it is totally irrelevant.

Paragraph No. 2. Investigation of that Complaint in Family Court is conducted by Detective Boyce Failing. Totally irrelevant.

Paragraph No. 3. Investigation revealed that he, that Branda Bradley was at 222 South Governor's Avenue.

APPENDIX C

Opinion of Delaware State Court

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEROME FRANKS,	§	
Defendant Below, Appellant,	§	
v.	§	No. 259, 1976
STATE OF DELAWARE,	§	
Plaintiff Below, Appellee.	§	

Submitted: March 16, 1977
Decided: April 29, 1977

Before HERRMANN, Chief Justice, DUFFY and McNEILLY, Justices.

Upon appeal from Superior Court. Affirmed.

Donald W. Huntley, Assistant Public Defender, Wilmington, for defendant below, appellant.

Harrison F. Turner, Deputy Attorney General, Dover, for plaintiff below, appellee.

McNEILLY, Justice:

Defendant appeals his conviction by a Superior Court jury of first degree rape, 11 Del.C. § 764,* second degree kidnapping, 11 Del.C. § 783,** and first degree burglary, 11 Del.C. § 826,*** contending that the Trial Court erred in refusing to hear impeachment testimony at a suppression hearing. We disagree.

---

* 11 Del.C. § 764 provides:

"A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and

"(1) In the course of the offense he inflicts serious physical, mental or emotional injury upon the victim, or

"(2) The victim was not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact."

"Rape in the first degree is a class A felony."

** 11 Del.C. § 783 provides:

"A person is guilty of kidnapping in the second degree when he unlawfully restrains another person with any of the following purposes:

"(1) To hold him for ransom or reward; or

"(2) To use him as a shield or hostage; or

"(3) To facilitate the commission of any felony or flight thereafter; or

"(4) To inflict physical injury upon him, or to violate or abuse him sexually; or

"(5) To terrorize him or a third person;

and the actor voluntarily releases the victim alive, unharmed, and in a safe place prior to trial."

"Kidnapping in the second degree is a class B felony."

*** 11 Del.C. § 826 provides:

"A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, he or another participant in the crime:

"(1) Is armed with explosives or a deadly weapon; or

"(2) Causes physical injury to any person who is not a participant in the crime."

"Burglary in the first degree is a class B felony."

I.

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant and identified defendant as the assailant.

A search warrant was obtained by the police and used to seize articles of defendant's clothing and a knife, which were introduced at trial over defendant's objection. The Trial Court refused to hear evidence offered at the suppression hearing to impeach the averments of the affidavit used to establish probable cause for the issuance of the search warrant.

At trial, defendant did not deny that he had had intercourse with the victim, asserting the defense of consent.

II.

Defendant contends that the Trial Court erred in refusing to hear testimony at the suppression hearing which would have impeached the affidavit establishing probable cause for the search warrant; that this violated the Fourth Amendment prohibition against unreasonable searches and seizures and the requirement that no search warrant shall issue but upon probable cause, supported by oath or affirmation. There is no attack upon the validity of the warrant on its face, and the United States Supreme Court has left open the extent to which a supporting affidavit may be challenged for accuracy. Rugendorf v. United States, 376

U.S. 528, 531-32, 84 S.Ct. 825, 827-28, 11 L.Ed.2d 887, 891 (1964). The majority of the jurisdictions considering this question have decided that no attack upon the veracity of an underlying affidavit may be made. See 68 Am. Jur.2d Searches and Seizures § 66 (1973). We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits. See State v. Petillo, N.J. Supr., 293 A.2d 649 (1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1393, 35 L.Ed.2d 611 (1973); Carter v. State Md. App., 337 A.2d 415 (1975).

Because of the resolution of this issue there is no need to consider defendant's other contentions, relating to the evidence that would have been introduced for impeachment purposes.

* * * *

Affirmed.

Supreme Court, U. S.
FILED
NOV 1 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

—v.—

DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

PETITION FOR CERTIORARI FILED JULY 29, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

—*v.*—

DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

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IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

THE STATE OF DELAWARE

vs.

JEROME FRANKS

IK-76-03-0120—RAPE FIRST DEGREE
IK-76-03-0121—BURGLARY FIRST DEGREE
IK-76-03-0122—KIDNAPPING SECOND DEGREE

RELEVANT DOCKET ENTRIES

1976 March 26 Commitment, Complaint & Warrant rec'd and filed.

1976 April 5 True Bill returned by the Grand Jury. Joseph J. Longobardi, Judge, rec'd and filed.

1976 April 8 Letter from Gary Dean rec'd and filed.

1976 April 15 Motion For Psychiatric Evaluation rec'd and filed.

1976 April 15 Order rec'd and filed.

1976 April 20 Request for Discovery (letter) rec'd and filed.

1976 April 22 Answer to Request For Discovery (letter) rec'd and filed.

1976 April 23 Letter from Gary Dean rec'd and filed.

1976 April 23 Defendant appeared in open Court. Reading of Indictment waived. Entered a plea of Not guilty. Rec'd and filed.

1976 May 14 Motion for Psychiatric Evaluation presented in open court. Order signed. Judge will give dates for the doctors to appear at the prison for evaluation. Attorney General's Office to prepare an Order as to States' Psychiatric examination, Mr. Finocchiaro to be filed by Attorney General.

1976 May 14 And Now, To Wit, this 14th day of May, A.D., 1976, it appearing upon application of David D. Finnocchiaro, Assistant Public Defender and Attorney for Jerome Franks, that a psychiatric and Psychological examination would be of assistance to him and his client in the preparation of the defense of the case;

It Is Ordered that Jerome Franks may be examined by Cono A. Gallianim Ph. D. at the Delaware Correctional Center, Smyrna, Delaware; and

It Is Also Ordered that Jerome Franks may be examined by George E. Voegele, M.D., at the Delaware Correctional Center, Smyrna, Delaware At Defendants costs. Judge will give dates for doctors to appear at prison. Joseph J. Longobardi, Judge.

1976 May 18 Order rec'd and filed.

It Is Hereby Ordered That the defendant Jerome Franks be examined by a competent psychiatrist and a competent psychologist. Joseph J. Longobardi, Judge.

1976 May 27 Request For Discovery rec'd and filed.

1976 June 7 Answer to Request For Discovery, rec'd and filed.

1976 July 18 Letter from Gary Dean, rec'd and filed.

1976 July 21 Psychiatric Report, rec'd and filed.

1976 July 22 Subpeonas requested, Subpeonas issued.

1976 July 26 Motion to Suppress Evidence and Request for Hearing rec'd and filed.

1976 July 30 Subpeonas requested, subpeonas issued.

1976 August 2 Motion to Suppress Evidence was held in open Court prior to the trial. Motion Denied. William G. Bush, III, Judge.

1976 August 2 Request For Voir Dire Questions, rec'd and filed.

1976 August 2, 3, 4, 5 The above-named defendant went on Trial before the following Sworn Jury: Michael Halada, Linda Curtis Adams, Nancy V. Norris, Mary Catherine Clendaniel, Lilly Marie Benson, Doris C. Backus, Dorothy M. Gooden, Marion O. Lewis, David H. Knox, Mary E. Hartle, Allen Warnick, David H. Garrison and Alt. Dorothy E. Gray. The defendant was tried on three charges. After hearing the evidence presented by the State and the testimony of the defense, the Jury retired to deliberate. At the conclusion of their deliberation, the Jury returned a verdict of Guilty to all three charges. William G. Bush, III, Judge.

1976 August 5 Request For Jury Instructions, rec'd and filed.

1976 August 16 Notice of Motion, Motion For Judgment of Acquittal and/or New Trial, Order, (not signed) rec'd and filed.

1976 August 19 Request For a Hearing rec'd and filed.

1976 September 3 Motion for Judgment of Acquittal and/or New Trial and Request for Hearing presented in open Court. Denied. William G. Bush, III, Judge.

1976 September 3 IK-76-03-0120-Sentence-Pay costs of prosecution. (Suspended). Be in prison for a period of your Natural Life beginning March 15, 2026. Be delivered to the Division of Adult Corrections of the Department of Health & Social Services for the purpose of carrying out this sentence. William G. Bush, III, Judge.

IK-76-03-0121-Sentence-Pay costs of prosecution. (Suspended). Be in prison for a period of Twenty-Five (25) Years, beginning March 17, 1976 and ending March 16, 2001. Be delivered to the Division of Adult Corrections of the Department of Health & Social Services for the purpose of carrying out this sentence. William G. Bush, III, Judge.

IK-76-03-0122-Sentence-Pay costs of prosecution. (Suspended). Be imprisoned for a period of Twenty-Five (25) Years, beginning March 16, 2001 and ending March 15, 2026. Be delivered to the Division of Adult Corrections of the Department of Health & Social Services for the purpose of carrying out this sentence. William G. Bush, III, Judge.

1976 September 29 Notice of Appeal rec'd and filed.

1976 October 1 Request for Transcript, rec'd and filed.

1976 October 5 Transcript of Motion for Judgment of Acquittal and/or New Trial and Transcript of Sentencing, rec'd and filed.

1976 October 25 Your application for reduction of sentence is hereby denied. William G. Bush, III, Judge. Rec'd and filed.

1976 November 23 Excerpts of trial record rec'd and filed.

1977 February 15 Excerpts of defendant's opening statement rec'd and filed.

1977 May 17 Mandate rec'd and filed on consideration whereof it is ordered and adjudged that the said judgment or order be and it is hereby affirmed.

1977 August 26 Application for reduction of sentence is denied. William G. Bush, III, Judge.

J. P. COURT #7

IN THE MATTER OF: Jerome Franks, B/M, DOB: 10/9/54 and 222 S. Governors Ave., Apt. #3, Dover, Delaware. A two room apartment located on the South side, second floor, of a white block building on the west side of S. Governors Avenue, Between Loockerman Street and North Street, in the City of Dover. The ground floor of this building houses Wayman's Barber Shop.

STATE OF DELAWARE)
COUNTY OF KENT) ss:
)

Be it remembered that on this 9th day of March A.D. 1976 before me John Green, personally appeared Det. Ronald R. Brooks and Det. Larry Gray of the Dover Police Department who being by me duly sworn depose and say:

That they have reason to believe and do believe that in the 222 S. Governors Avenue, Apartment #3, Dover, Delaware. A two room apartment located on the south side second floor of a white block building on the west side of S. Governors Avenue between Loockerman Street and North Street in the City of Dover. The ground floor of this building houses Wayman's Barber Shop the occupant of which is Jerome Franks there has been and/or there is now located and/or concealed certain property in said house, place, conveyance and/or on the person or persons of the occupants thereof, consisting of property, papers, articles, or things which are the instruments of criminal offense, and/or obtained in the commission of a crime, and/or designated to be used in the commission of a crime, and not reasonably calculated to be used for any other purpose and/or the possession of which is unlawful, papers, articles, or things which are of an evidentiary nature pertaining to the commission of a crime or crimes specified therein and in particular, a white knit thermal undershirt; a brown ¾ length leather jacket with a tie-belt; a pair of black mens pants; a dark colored knit hat; a long thin bladed knife or other instruments or items relating to the crime.

Articles, or things were, are, or will be possessed and/or used in violation of Title 11, Sub-Chapter D, Section 763, Delaware Code in that [See attached probable cause page].

Wherefore, affiants pray that a search warrant may be issued authorizing a search of the aforesaid 222 S. Governors Avenue, Apartment #3, Dover, Delaware. A two room apartment located on the south side second floor of a white block building on the west side of S. Governors Avenue between Loockerman St. and North Street, in the City of Dover in the manner provided by law.

/s/ Det. Ronald R. Brooks
Affiant

/s/ Det. Larry D. Gray
Affiant

SWORN to (or affirmed) and subscribed before me this 9th day of March A.D. 1976.

/s/ John [illegible] Green
Judge Ct 7

The facts tending to establish probable cause for the issuance of this search warrant are:

1. On Saturday, 2/28/76, Brenda L. Bradley, W/F/15, reported to the Dover Police Department that she had been kidnapped and raped.
2. An investigation of this complaint was conducted by Det. Boyce Failing of the Dover Police Department.
3. Investigation of the aforementioned complaint revealed that Brenda Bradley, while under the influence of drugs, was taken to 222 S. Governors Avenue, Apartment 3, Dover, Delaware.

4. Investigation of the aforementioned complaint revealed that 222 S. Governors Avenue, Apartment #3, Dover, Delaware, is the residence of Jerome Franks, B/M DOB: 10/9/54.
5. Investigation of the aforementioned complaint revealed that on Saturday, 2/29/76, Jerome Franks did have sexual contact with Brenda Bradley without her consent.
6. On Thursday, 3/4/76 at the Dover Police Department, Brenda Bradley revealed to Det. Boyce Failing that Jerome Franks was the person who committed the Sexual Assault against her.
7. On Friday, 3/5/76, Jerome Franks was placed under arrest by Cpl. Robert McClements of the Dover Police Department, and charged with Sexual Misconduct.
8. On 3/5/76 at Family Court in Dover, Delaware, Jerome Franks did, after being arrested on the charge of Sexual Misconduct, made a statement to Cpl. Robert McClements, that he thought the charge was concerning Cynthia Bailey not Brenda Bradley.
9. On Friday, 3/5/76, Cynthia C. Bailey, W/F/21 of 132 North Street, Dover, Delaware, did report to Dover Police Department that she had been raped at her residence during the night.
10. Investigation conducted by your affiant on Friday, 3/5/76, revealed the perpetrator of the crime to be an unknown black male, approximately 5'7", 150 lbs., dark complexion, wearing white thermal undershirt, black pants with a belt having a silver or gold buckle, a brown leather ¾ length coat with a tie belt in the front, and a dark knit cap pulled around the eyes.
11. Your affiant can state, that during the commission of this crime, Cynthia Bailey was forced at knife point and with the threat of death to engage in sexual intercourse with the perpetrator of the crime.

12. Your affiant can state that entry was gained to the residence of Cynthia Bailey through a window located on the east side of the residence.
13. Your affiant can state that the residence of Jerome Franks is within a very short distance and direct sight of the residence of Cynthia Bailey.
14. Your affiant can state that the description given by Cynthia Bailey of the unknown black male does coincide with the description of Jerome Franks.
15. On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people.
16. On Tuesday, 3/9/76, Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket.
17. On Tuesday, 3/9/76, Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat.
18. Your affiant can state that a check of official records reveals that in 1971 Jerome Franks was arrested for the crime of rape and subsequently convicted with Assault with intent to Rape.

J. P. COURT #7

IN THE MATTER OF: Jerome Franks, B/M, DOB: 10/9/54 and 222 S. Governors Ave., Apt. #3, Dover, Delaware. A two room apartment located on the South side, second floor, of a white block building on the west side of S. Governors Avenue, between Loockerman Street and North Street, in the City of Dover. The ground floor of this building houses Wayman's Barber Shop.

THE STATE OF DELAWARE TO: Det. Ronald R. Brooks and Det. Larry Gray of the Dover City Police Department with the assistance of any police officer or constable or any other necessary or proper person or persons or assistance.

GREETINGS:

Upon the annexed affidavit and application or complaint for a search warrant, as I am satisfied that there is probable cause to believe that certain property, namely: a white knit thermal undershirt; a brown ¾ length leather jacket with a tie-belt; a pair of black mens pants; a dark colored knit hat; a long thin bladed knife or other instruments or items relating to the crime is being concealed on the person/premises described in the annexed affidavit and application or complaint; and that search of the premises is necessary in order to prevent the escape or removal of the person or thing to be searched for;

NOW THEREFORE, YOU ARE HEREBY COMMANDED forthwith to search the above named person, persons, house, place or conveyance for the property specified in the annexed affidavit and application, and to search any occupant or occupants found in the house, place or conveyance above named for such property serving this warrant and making the search in the daytime, and, if the property, papers, articles, or things, or any part thereof, be found there, to seize it, prepare a written inventory of the property seized and to return the property and this warrant to be forthwith with the written inventory and

the person or persons in whose custody or possession the property was found to be dealt with according to law.

DATED the 9th day of March A.D. 1976.

/s/ John [illegible] Green
Judge—JP Court #7

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

Cr. A. No. IK-76-03-0120,
-0121,
-0122.

THE STATE OF DELAWARE, PLAINTIFF,

vs.

JEROME FRANKS, DEFENDANT.

MOTION TO SUPPRESS EVIDENCE — AND REQUEST FOR HEARING

COMES NOW, the Defendant, Jerome Franks, through his attorney, David D. Finocchiaro, Assistant Public Defender, in the above-captioned case, and moves, pursuant to Rule 41(e) of the Superior Court Criminal Rules, to suppress any evidence seized from him as a result of a search of his residence, occurring on or about the 9th day of March, 1976. Said search resulted in the seizure of items of clothing, a knife, and miscellaneous items.

The search and seizure was unlawful for the following reasons:

1. On or about March 9, 1976, the Defendant, Jerome Franks, was residing at 222 S. Governors Avenue, Apartment #3, Dover, Delaware.
2. On or about March 9, 1976, members of local police forces conducted a search of his residence.
3. No permission was given by the Defendant or anyone to permit a search of his apartment.
4. The search was not incident to a lawful arrest.
5. The search warrant used was legally insufficient in that it did not show sufficient probable cause.
6. The affidavit portion of the search warrant is merely conclusory.

7. Said search resulted in the seizure of items of clothing, a knife and miscellaneous items.
8. Certain items seized were not in plain view.

WHEREFORE, the Defendant, pursuant to Rule 47 of the Superior Court Criminal Rules, requests a hearing for the Court to consider if the aforesaid search and seizure was in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States and of Articles 1 and 6 of the Delaware Constitution of 1897, as amended.

/s/ David D. Finocchiaro
DAVID D. FINOCCHIARO
Assistant Public Defender
101 Court Street
Dover, Delaware 19901

DATED: 7/27/76

[1] IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY

Criminal Action Nos. IK-76-03-0120, IK-76-03-0121, IK-76-03-0122

Trial: August 2nd, 3rd, 4th & 5th, 1976.

THE STATE OF DELAWARE

—*vs*—

JEROME FRANKS, DEFENDANT

BEFORE: HON. WILLIAM G. BUSH, III, J., and a jury.

APPEARANCES:

HARRISON F. TURNER, Esq.,
Deputy Attorney General on
behalf of the State of Delaware.

OFFICE OF THE PUBLIC DEFENDER
By: DAVID D. FINOCCHIARO, Esq.,
on behalf of the Defendant.

EXCERPTS OF TRIAL RECORD

• • • •

[4] THE COURT: The State of Delaware versus Jerome Franks, motion to suppress. Mr. Finocchiaro, you may proceed.

MR. FINOCCHIARO: Your Honor, first of all I would ask witnesses be sequestered during this hearing.

THE COURT: You may step outside in the hallway.

(The witnesses left the courtroom.)

MR. FINOCCHIARO: Initially, the Defense would like to call Detective Brooks to the stand.

THE COURT: Isn't this a motion to suppress the search warrant because it was not sufficient?

MR. FINOCCHIARO: Yes, Your Honor.

THE COURT: Then we are arguing about the contents of the search warrant, are we not?

MR. FINOCCHIARO: That is correct, Your Honor. I intend to produce testimony along those lines.

THE COURT: What is the need for testimony is [5] the next question if we are talking about whether the search warrant is sufficient?

MR. FINOCCHIARO: Your Honor, I have two particular reasons.

THE COURT: We are putting this on the record. We have discussed it the other day.

MR. FINOCCHIARO: I question the validity of certain of these points stated in the preliminary hearing—I'm sorry. I question the validity of some of the points made in the affidavit in this case that was involved in issuing the search warrant and, in addition, I question whether or not there was a prior potential violation of Mr. Franks' right whereby the fruit of the poisonous tree aspect may apply.

THE COURT: Anything further?

MR. FINOCCHIARO: They are the points, Your Honor, that I have. I intend to produce witnesses along these lines.

THE COURT: Is the search warrant in the file?

MR. FINOCCHIARO: I don't know if it is in your file or not, Your Honor.

THE COURT: It is not attached to your motion.

[6] MR. FINOCCHIARO: Apparently not.

THE COURT: I cannot rule upon it unless I can have it.

MR. FINOCCHIARO: The only copy I have, Your Honor, does have various notes made by me. I don't know if the Attorney General would have an unmarked one or not.

MR. TURNER: I have just one copy, but I would be glad to furnish it to the Court. Both the Court and I can use it I guess. I would like to respond if I may.

THE COURT: Let me see if I can make it clear. You feel certain matters in the motion to suppress are not correct and you wish to present evidence to show they are not correct.

MR. FINOCCHIARO: Yes, Your Honor. I believe a good portion of the information obtained in this affidavit is totally irrelevant to issuance of a search warrant and certain factors that were relied upon, I would say the stronger factors, some of them are incorrect and that there was misrepresentations made in the affidavit.

Further, another particular comment in Paragraph No. 8, I question whether or not there may have been any prior violations of Mr. Franks' rights such that whatever information they obtained, if it was obtained [7] unconstitutionally, could not be used as subsequent probable cause in the issuance of the search warrant.

MR. TURNER: May it please the Court. In response, may I point out that initially in the ruling upon the search warrant our Supreme Court has stated in Peason vs. State that sections 2306 and 2307 of 11 Delaware Code, like Federal Criminal Rule 41e contemplate a "four corners" test for probable cause. Sufficient facts must appear in the face of the affidavit so Magistrate's personal knowledge, notwithstanding a reviewing court, can verify the existence of probable cause. Thus, one looks only to the facts recited in the Complaint.

Thus, this is the interpretation that our Supreme Court has stated with respect to probable cause, looking only to the facts recited in the Complaint. You have a four corners test.

Now, as to Mr. Finocchiaro's wanting to call witnesses, may I refer the Court to first of all 68 AmJur 2nd Page 720. The Supreme Court—

THE COURT: Let's complete the record. What witnesses do you wish to call, and would you make a proffer of what they will testify to, Mr. Finocchiaro?

[8] MR. FINOCCHIARO: Yes, Your Honor. Would you like me to limit myself—or, first of all I will address what Colonel Turner has stated.

THE COURT: Not yet. Why don't you make your proffer and then we can delineate the issues.

MR. FINOCCHIARO: Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center and Mr. James Morrison, formerly of the Delaware Youth Center, who I believe will give information that will intend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.

THE COURT: That would be of what paragraph? Paragraph 15?

MR. FINOCCHIARO: Yes, Paragraphs 15, 16 and 17.

THE COURT: And what they would testify to would rebut what is in Paragraph 15, 16 and 17.

MR. FINOCCHIARO: Would rebut not only certain [9] factual matters, but also as to whether or not it was given and to whom it was given and in addition in Paragraph number 8—

THE COURT: In other words, they will say that none of that information was given?

MR. FINOCCHIARO: They will testify that neither one of them to the best of their knowledge gave this information to either of the affiants contained in this affidavit, and additionally that the information that they did give was somewhat different than contained in the affidavit and was not to an officer who even swore out the affidavit and that what was stated in there is not an accurate representation of precisely what they said.

THE COURT: So will you have other witnesses?

MR. FINOCCHIARO: Yes. I also intend to call Officer McClements of the Dover Police Department in reference to Paragraph No. 8. I feel that there should be a showing of absence of taint because I think the case law is clear that if something is obtained in violation of constitutional rights that cannot be used later to show probable cause in the issuance of a search, of an arrest or a search warrant, and basically then I [10] would possibly or potentially produce testimony of Mr. Franks. But they are the witnesses I would like to call. In addition I would like to call Detective Brooks.

THE COURT: What is your proffer of Mr. Franks?

MR. FINOCCHIARO: Mr. Franks will dispute some of those factors in there.

THE COURT: Which factors?

MR. FINOCCHIARO: Well, let me put it this way, Your Honor. I do not know what Officer McClements will testify to. His proffer will depend on the testimony of Officer McClements. I do not know whether he would agree or disagree with what he has to say.

THE COURT: You want to call Officer McClements, I presume, as a hostile witness, to examine him as to the contents of Paragraph No. 8?

MR. FINOCCHIARO: That is correct.

THE COURT: Now, we have delineated exactly what the Defendant intends to proceed on here.

MR. FINOCCHIARO: And, Your Honor, one additional point, I would anticipate calling Detective Brooks to question him as to the comments that he made in Paragraphs 15, 16 and 17, and I would also, as previously mentioned, [11] call both Mr. Morrison and Mr. Lucas in that same regard.

MR. TURNER: I will first approach this problem from the standpoint of whether Mr. Finocchiaro is entitled to call any witnesses.

As I have pointed out on probable cause, Pearson vs. State is the latest case on that and I have already recited that. It is to be based on the four corners.

Now, the motion we have before us is in connection with suppression which Mr. Finocchiaro has enlarged

upon that. He wants to test the validity of the statements in the affidavit.

I would like to refer the Court to the pertinent authority first, and I start off with 5 ALR 2nd Page 396. In absence of a statute the general rule basically—Delaware has no statute which would embrace this particular area. The cases involving the problem under annotation exhibit a number of different ways by which the question is actually presented to the appellant courts. All proceed on the assumption that after execution of the search warrant criminal proceedings have been brought.

A motion to quash the search warrant is one of [12] the ways of attacking.

I come to the key involving these various methods of raising the question, exhibiting the different specific challenges to the matter. In the supporting affidavit or complaint mentioned are a large number of decisions which represent an overwhelming majority of the cases decided apart from applicable statutes supporting the view that the matters contained in an affidavit or verified complaint on which a search warrant is based may not be questioned or disputed by the person against whom the warrant is directed. Citations on that: Illinois, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Oklahoma—many cases under each—Rhode Island, Tennessee, Texas, Washington, throughout the entire jurisdiction.

One particular case that comes to my attention, it is a Maryland case, Tucker vs. State 224 A. 2nd 111 certiorari denied, 386 U.S. 1024.

The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself and the truth of the alleged ground stated in the affidavit cannot be [13] controverted by receiving the testimony of the accused and of the witness. As I have said in Pearson vs. State one only looks to the facts recited in the affidavit in support of the search warrant.

I now pass to 68 AmJur 2nd at page 625. The Supreme Court of the United States has not directly passed

upon the question as to the extent to which a court may permit an attack upon the supporting affidavit for a search warrant where the warrant is valid on its face and the allegations of the affidavit, assuming them to be true, establish probable cause.

Rugendorf vs. the United States, 376 U.S. 528 held that even if such attack is proper it cannot be based on factual inaccuracies which are of only peripheral relevancy to showing of probable cause and which do nothing to the integrity of the affidavit.

A majority of the state courts which have considered the problem have held that in the absence of statute the matters contained in an affidavit in which the search warrant is based may not be disputed by the person against whom a warrant is directed for the purpose of showing the invalidity of the warrant. Citations: [14] Laberto vs. State, Arkansas; People vs. Sansbury, Illinois, certiorari denied; Mattingly vs. Commonwealth, Kentucky; Owens vs. State, Tennessee—all these cases, all state cases have held that you cannot go back behind the search warrant. It must be decided on the four corners. This is universal.

There was a Harvard Law Review section which in Volume 84, Harvard Law Review at page 830 emphasized the situation as it exists and in that article pointed out that state law, all states—most states considering the matter have denied it.

Now, since that time there are the circuit court jurisdictions. I might say that the 8th Circuit, the 6th Circuit, the 7th Circuit, and the 4th Circuit in the Court of Appeals of each circuit interpreting Rule 41e of the Federal Criminal Rules which differs from ours and has a statement in there that would allow the consideration of the matter. Rule 41 Criminal Procedure in Federal Law: A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress the evidence so obtained on the [15] ground that, one, the property was illegaly seized without warrant which doesn't apply here or, four, there was not probable cause for believing the existance of the

ground upon which the warrant was issued. There is the difference. Therefore, the Federal courts and certain cases have considered whether or not testimony could be taken in support of the affidavit.

The 4th, 6th, 7th and 8th Circuits, which I have the cases here: the 7th Circuit, United States vs. Carmicheal 489 F. 2nd 983, 1973; the 6th Circuit, United States vs. Luna 525 F. 2nd 4 1975; the 4th Circuit, United States vs. Lee 19 Criminal Law 2193, just decided in May; the 8th Circuit, United States vs. Marehart 492 F. 2nd 897. These Circuits all agree that only the deliberate inclusion of false statement or wreckless inclusion of false statement material to the establishment of probable cause. They take into consideration: Did the officer intend to deceive the magistrate? If such is so, then and there must be a showing of such before even a hearing is awarded.

The 5th Circuit and the 2nd and 1st Circuits: 5th Circuit in United States vs. Thomas 489 F. 2nd 664 also includes the misstatement with the intent to deceive [16] the magistrate must be involved.

Now, these cases are analyzed under United States vs. Lee which appears in 16 Criminal Law at page 2311 entitled: Search Warrant Challenges the Truthfulness of Supporting Affidavit. They analyzed these cases.

However, I am pointing out that even in the Federal where it is much stricter than what Mr. Finocchiaro tries to do here today, much stricter, they are still interpreting a different Rule 41e which we don't have.

I reiterate again all State courts, majority of State courts that have considered this question, have decided that you cannot go behind the affidavit. The Maryland court, which I have just cited as the most recent case in the nearest jurisdiction, but the jurisdictions which have ruled upon this are numerous, and as I quote from the authorities they have stated that you cannot go behind the truth of the warrant.

One case stated it just may not be disputed upon the facts that exist in the search warrant; therefore, the State would contend that the only thing before this Court, both by the motion of the Defendant and by case

law, is to decide on the four corners of this search [17] warrant application and the affidavit, whether it establishes probable cause and under these considerations I submit to the Court that under United States vs. Ventresca the Court must read the search warrant as a practical and not an abstract thing.

They must be tested and interpreted by the Magistrate Court in a common sense and realistic fashion. This is taken from United States vs. Ventresca 380 U.S. 102.

Quoting from Jones vs. United States 362 U.S. 257, 260, "A warrant must be looked at from a reasonable fashion." In that particular case they admit it. Affidavits are not drawn by lawyers but only by policemen not educated under the stress of need, and not educated as an attorney and they must be looked at realistically in order to arrive at whether or not probable cause has been established.

Under those circumstances I submit to the Court that the four corners of this warrant are the only thing to be considered at this time and the Court must consider and find probable cause is established by the warrant.

[18] THE COURT: So he is calling his first witness. You are in effect objecting to the relevancy of the proposed witness?

MR. TURNER: I am objecting to his going behind it in any way. I am stating that before the Court is a motion which it must decide on the four corners as indicated by Pearson and that is it.

MR. FINOCCHIARO: Your Honor, first of all the State has mentioned the use of the four corners test. I think that goes to an entirely different factor than what we have presented here.

I think the four corners test questions whether or not there can be, the affidavit can be supplemented by material presented to the Magistrate. In other words, supplemented orally, matters not contained in it, and the Court as a matter of practical necessity said that is ridiculous. Quite simply, how can we review, a higher court review what was said if it was only said orally? We must go by the affidavit.

This I feel is an entirely different aspect and as such it is not controlled by the four corners test at all and this point, as previously indicated, goes [19] whether I, the Defense, may present evidence not presented to the Magistrate that impeaches the representation of the affidavit.

I would like to bring to the Court's attention the United States Supreme Court case: North Carolina v. Renzi, June 17, 1974. It was for a petition for a writ of certiorari which was denied. In an opinion by Justice White he denied the writ of certiorari and went on to say, on the second page of that opinion on 94 Supreme Court Reporter 3182, "Whether a search warrant and supporting affidavit are adequate on their face may later be impeached is squarely presented here. The time is ripe for decision on this question for the courts are in conflict and the question is important for the proper administration of criminal justice." Unfortunately, Justice White did not go on to decide that particular question that I am aware.

He also points out in this, the United States Supreme Court case of Rugendorf vs. United States which does leave the question unsettled, but there it was talking about issues of peripheral relevancy.

I would also like to point out that some of [20] the cases cited indicate that—Steel vs. United States 267 U.S. 498 I feel can be interpreted to indicate the challenger may present evidence although Rugendorf as previously mentioned does treat the matter as unsettled.

North Carolina vs. Renzi previously mentioned does collect the views and indicates there is a vast disagreement among the states. It is ripe for consideration, it is ripe for decision. It has not been so and apparently, to the best of my research and apparently for the State's, for that matter has not been determined by this State.

Further, I think we are not talking about a matter of peripheral relevance here. The affidavit indicates that personal information, personal contact was made with certain witnesses and certain information was obtained. I intend to produce evidence that the person who said

that did not personally contact those individuals at all, and I think this is not dealing with peripheral relevancy. As such, I feel that there may have been at least some misrepresentation to the Magistrate from what I have been told that in fact they didn't even contact that person. They may have had some other information [21] a little bit different, but obtained through another police officer and they learned of it, but nevertheless apparently a misrepresentation to the Magistrate in the court below and I don't feel that is dealing with the peripheral relevancy.

I think any magistrate would be extremely upset if a police officer gave him an affidavit and it turned out later that officer did not obtain that information personally like the way he said it was. And, in addition, like I said, I think this issue is ripe at this time. I am taking the words of Justice White in that matter.

Further, I feel we have an additional problem here and that is that if the information obtained in Paragraph No. 8 was obtained in violation of constitutional rights that that should not later be used as probable cause to be used in the issuance of a search warrant. Since this matter has not been presented, I question whether this court can merely say Well, if some courts do not allow it and some courts do I will merely go by the majority without some type of independent evaluation by this court, and I feel that since we are not talking [22] about peripheral relevancy, but basic misrepresentation, this court should hear this testimony and make a decision on it.

MR. TURNER: I would like to answer that briefly. Just because Justice White has stated it is time for the Supreme Court of the United States to decide this case, it seems to me to be putting a hell of a burden on this court to step in and do what the Supreme Court has not.

In the Harvard Law Review article that I cited, it states, "It is deplorable at this late date. The law is in the state of confusion of whether the validity of the search warrant affidavit may be challenged. Motions to suppress evidence are made daily in trial courts, state

and federal, with the law so unsettled results vary from judge to judge. Respect for the judicial process must suffer. The time is ripe for the Supreme Court to clarify this important question."

In Rugendorf the Court assumed arguendo that such a challenge was available. Due respect for the fourth amendment protection against unreasonable searches should lead the Court now to give its assumption [23] the dignity of a firm holding.

In other words, this Law Review Article which is quite comprehensive states that it is ripe. Justice White states it is ripe, but nevertheless it hasn't been decided.

In the meantime, all State courts throughout the entire country, the jurisdictions have stated that it is not subject to attack and the various authorities on this case state that as I stated to you from AmJur 2nd, as I stated from 5 ALR 2nd. They are taking the cases in the different jurisdictions and they find the State courts have universally almost, there are a few isolated occasions where they have allowed it in, but the universal: No.

Now, the mere fact it might be ripe for decision in the Supreme Court of the United States should have no bearing on this court sitting here.

It is the contention of the State that this court should follow those lines or cases which are by far the majority view and under those circumstances the testimony is not admissible in connection to test the validity of the warrant.

I might state that Mr. Finocchiaro is arguing [24] about peripheral and nonperipheral which is taken from Rugendorf which approach the question, but did not decide it. So it is still up in the air. So whether it is peripheral or not is still beside the point.

The point is whether he can introduce testimony, and with all the state jurisdictions ruling against it I feel that this court would join the majority rather than the distinct and definite minority.

MR. FINOCCHIARO: Your Honor, if I may briefly respond. First of all, Colonel Turner made one statement which I think he later altered slightly. I think he

said all courts have said that it is not, cannot be challenged and I think he has indicated it is a majority. That is apparently incorrect. There are states that will allow the court or allow the Defendant, as the case may be, to challenge the affidavit. Included among those cases are: Alabama, California, New York and Pennsylvania and initially when he made the statement "all" apparently Delaware has not ruled on this issue and I don't think the court can merely toss a coin and say: If it is six to five or ten to five, whatever the case may be, then therefore that is the proper course to follow without [25] some type of independent evaluation. But I would like to go on.

Let me say that basically what I am indicating is not only a factual discrepancy, but I would say that there has been some type of misrepresentation as to what that police officer personally learned and related to the Magistrate, and I think that does make a stronger case where there is some type of bad faith or misrepresentation, and I am basing this solely on the information that is provided me by my witnesses. I have not talked to Detective Brooks about this. I don't know what his position is, but nevertheless I feel this issue is ripe.

I think Colonel Turner has indicated that and I don't think this court, where it has never been addressed to this court, can merely indicate if other states do it that way I would just go by the majority and disregard the minority and handle it in that fashion.

MR. TURNER: Most of those minority states have statutes which are invoked.

THE COURT: I am going to sustain the State's objection. You may proceed.

MR. FINOCCHIARO: Your Honor, I would like to [26] make a witness proffer if the Court would so allow.

THE COURT: You have already made a proffer.

MR. FINOCCHIARO: That is a lawyer proffer. I would like to make a witness proffer.

THE COURT: What is the difference.

MR. FINOCCHIARO: Well, I think they would perhaps state a little bit more emphatically.

THE COURT: Have the witnesses come in and tell us?

MR. FINOCCHIARO: Yes. I made my proffer, Your Honor, but I would still like to make a witness proffer.

MR. TURNER: May I suggest the Court has just ruled that that is exactly what it can't do.

THE COURT: All right. That is denied. Proceed.

MR. FINOCCHIARO: Your Honor, you have ruled apparently that regardless there is factual inaccuracies or misrepresentations in here that I am not allowed to challenge it. Nevertheless, I still question if your ruling goes to the effect that if there was a violation of Mr. Franks' rights, and I am talking in reference to Paragraph No. 8, and as such is tainted evidence, whether [27] or not the Court is going to allow me to examine whether or not there was any taint. In other words, whether or not it should be excluded from the search warrant. Perhaps I should repeat that.

In addition to my other argument there may be inaccuracies or misrepresentations, I feel that perhaps in reference to Paragraph No. 8 there may have been a violation of Mr. Franks' constitutional rights. I feel that evidence was tainted and that it should not be used as probable cause in the later obtaining of a search warrant.

I don't know if your ruling has precluded me from that also.

MR. TURNER: As I understand it, we are now at the position where the Court is about to decide the validity of the search warrant on the four corners; therefore, that issue seems to be the only one before the Court.

THE COURT: I presume he has some further comments as to Paragraph No. 8 in which I presume Mr. Finocchiaro was saying this was not argued and he wishes to present argument on Paragraph No. 8 as to facts. You wish to present evidence to show that the information [28] obtained in Paragraph No. 8 was obtained in violation of Defendant's constitutional rights.

MR. TURNER: Isn't he going back beyond the search warrant in that case to establish the validity of these things which, as I understand it, we have just finished

arguing? The Court has made its ruling. Is the Court going to allow him to go back and present testimony on the validity of the search warrant?

It is my understanding we are here on a suppression hearing. It is my further understanding that we have argued as to whether he can go back and present testimony as to the validity of those items in the search warrant. It is my further understanding the Court has ruled against it.

Now, we are at the position where, as I see it, before the Court is now the search warrant for decision as to whether it establishes probable cause without the necessity or actually the permission to call witnesses.

THE COURT: Is there additional argument you wish to make as to Paragraph No. 8 that you have not made?

MR. FINOCCHIARO: Yes, Your Honor [29] like to point out in a little bit more detail precisely what my position is. In other words, I am stating that if the statement that was made, contained in Paragraph No. 8 was unconstitutionally obtained that is perhaps in violation of Miranda rights or voluntariness standard or whatever constitutional rights referring to it is tainted evidence and that may not be used to support a subsequent probable cause to determination of the issue of the warrant.

THE COURT: You have indicated you have not argued this point before?

MR. FINOCCHIARO: Your Honor, I preface this by saying I do not know if your ruling takes this under its umbrella if you will.

THE COURT: The answer is yes.

MR. FINOCCHIARO: In other words, your ruling is that regardless of any factual inaccuracies or misrepresentations, that if there is unconstitutionally obtained evidence that may be used to obtain a search warrant? Is that what your ruling is, Your Honor? In other words, I have case law which I think seems to indicate to the contrary.

[30] MR. TURNER: I think all the Court has ruled is that they can't go behind the search warrant without making any ruling about constitutional, unconstitutional

or anything else. It is just the Defendant is barred from going behind the search warrant.

THE COURT: That is correct.

MR. FINOCCHIARO: Your Honor, there are cases after cases which talk about an illegal search and then goes on to determine that what was found during that illegal search cannot be used as probable cause for a subsequent search. Now, how can you determine that the second search was invalid unless you look and determine what the first search was and that is the problem that I am faced with this morning.

MR. TURNER: There is no previous search that I know of.

MR. FINOCCHIARO: I am talking about case law, talking about fourth amendment, fifth amendment. I think the argument is equally applicable.

THE COURT: Anything further, counsel?

MR. FINOCCHIARO: I have nothing further, Your Honor.

[31] MR. TURNER: I think the Court has already ruled.

• • • •

BAILEY—DIRECT EXAMINATION

[76] BY MR TURNER:

Q. Now, Mrs. Bailey, is the individual who intruded into your home and is the subject of what I have related present here in the courtroom?

A. Yes.

Q. Would you point him out, please?

A. This person here (indicating).

MR. TURNER: Let the record reflect that the [77] witness has pointed out the Defendant and identified him.

BY MR. TURNER:

Q. Approximately how long did you have an opportunity to observe him when the lighting conditions had reached daylight?

A. As far as I can recall it could have been no longer than ten to fifteen minutes.

Q. Now, when the refrigerator door was open, did you have an opportunity to observe him at that time?

A. Yes. That is when I first made notice especially of the clothing.

Q. And approximately how long was that?

A. One minute.

Q. Now, at all times throughout this entire period what was the furtherest away you were able to get from the Defendant throughout the entire period?

A. Probably a distance of four feet at the most.

Q. At the most?

A. Yes.

Q. That is he was constantly with you throughout the entire period you have related?

A. Yes.

• • • •

BROOKS—DIRECT EXAMINATION

[191] BY MR. TURNER:

Q. Now, on March 9 what did you do in connection with this investigation reference to search warrant?

A. We executed a search warrant on Jerome Franks' apartment at 222 South Governor's Avenue at which time clothing was confiscated matching the description of the clothing that the suspect in the rape had been wearing.

Q. At this point I show you State's for Identification A and ask you what significance this might have to you?

A. This was confiscated during the execution of the search warrant.

Q. Can you identify that as being the object of the search warrant or recovered on the search warrant?

A. Yes, sir, I can. It bears an evidence tag filled out by myself.

Q. By whom?

A. By myself.

MR. TURNER: At this point I move State's Identification A into evidence as Exhibit 1.

MR. FINOCCHIARO: Your Honor, I believe my [192] objection has previously been made on the basis

of the search, and I object to it on that ground. In addition, I question the fact that Mrs. Bailey is not sure precisely that it was—could not identify this as being something other than similar to what that alleged intruder was wearing. For those two reasons I object to its entry.

THE COURT: What purpose is it being introduced?

MR. TURNER: It is being introduced in conjunction as proof of what was found on the search warrant, answering the description that this officer had of the clothes that were worn by the Defendant.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 1.

(White thermal undershirt previously marked "State's Exhibit A, for Identification" marked "State's Exhibit No. 1" and received in evidence.)

BY MR. TURNER:

Q. I now show you State's for Identification B and ask you what significance that has to you?

A. This was also found in Jerome Franks' apartment during the execution of the search warrant. It bears the evidence tag that I filled out at the time.

[193] MR. TURNER: Move State's for Identification B into evidence as State's Exhibit 2.

MR. FINOCCHIARO: Again, Your Honor, I have the same objections as previously stated.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 2.

(Hat previously marked "State's Exhibit B, for Identification" marked "State's Exhibit No. 2" and received in evidence.)

BY MR. TURNER:

Q. I now show you State's for Identification C and ask you if you can identify that.

THE COURT: B for Identification will be admitted for the same purpose as A?

MR. TURNER: Yes, Your Honor.

THE WITNESS: This was also found in Jerome Franks' apartment by myself and marked as evidence. It bears my evidence tag.

MR. TURNER: Move to introduce into evidence State's exhibit C as State's 3.

MR. FINOCCHIARO: Again, Your Honor, the same objections.

[194] THE COURT: And introduced for the same purposes as A and B?

MR. TURNER: Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 3.

(Pants previously marked "State's Exhibit C, for Identification" marked "State's Exhibit No. 3" and received in evidence.)

BY MR. TURNER:

Q. State's for Identification D, what significance does that have to you?

A. This was also found in Jerome Franks' apartment by myself and does bear my evidence tag.

MR. TURNER: Move to introduce into evidence State's for Identification D as State's Exhibit 4.

MR. FINOCCHIARO: Your Honor, same objections.

MR. TURNER: Same reasons.

THE COURT: Introduced for the same purposes?

MR. TURNER. Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 4.

(Coat previously marked "State's Exhibit D, [195] for Identification" marked "State's Exhibit No. 4" and received in evidence.)

BY MR. TURNER:

Q. I now show you State's for Identification D—I'm sorry, E, and ask you what significance that may have to you.

A. This was found on the kitchen table of Jerome Franks' apartment during the execution of the search warrant marked with my evidence tag.

MR. TURNER: Move for introduction as State's Exhibit 5, State's for Identification E.

MR. FINOCCHIARO: Your Honor, I object to it on the same grounds. In addition, I believe that Cynthia Bailey indicated that she saw a knife in pitch blackness and apparently merely gave a description of it as being a knife. I question the evidenciary value of something found in the apartment without something more to designate that was the one allegedly used.

MR. TURNER: That is a jury question, the weight to be attached to it, Your Honor.

THE COURT: What purpose is it being introduced?

MR. TURNER: I represent it is being introduced [196] for the same purpose as all the other exhibits as found in the search warrant by this officer as being under a description that he had at that time.

THE COURT: For that purpose it will be admitted into evidence as State's Exhibit No. 5.

(Knife previously marked "State's Exhibit E, for Identification" marked "State's Exhibit No. 5" and received in evidence.)

• • • •

[215] BY MR. TURNER:

Q. Detective Brooks, just prior to the jury retiring I had asked you on Wednesday, March 10, in the early afternoon, did you contact the Defendant at the [216] Delaware Correctional Center?

A. Yes, sir, I did.

Q. Now, what conversation did you have with the Defendant at that time?

A. I first told Mr. Franks that I was there because I was investigating a rape in Dover and he was a suspect in it at that time. I then advised him that I would like to talk to him, but he had the right to remain silent, anything that he chose to say could and would be used against him in court at a later time, that he had the right to have an attorney present prior to my asking him questions and that if he could not afford an attorney the State of Delaware would provide one for him prior to him answering questions.

Q. What was his reply?

A. He replied that he didn't want an attorney, that he knew his rights better than I did and I proceeded to ask him questions.

Q. What questions did you ask him? What were his answers?

A. He at first told me that he didn't know anything about any rape and didn't know anybody by the name of [217-218] Cynthia Bailey. At that time I told him quite frankly I didn't believe him. We had executed a search warrant of his apartment and that I had found clothing fitting the description given by our victim and that I felt that I could place him at the house and it was at this time that he told me that Yes, he was at the house, that he had been there 5:00 in the morning on the fifth of March because he was aware that Mrs. Bailey's husband worked at night.

He had told me that he had met her up around Wesley College prior to this and talked shortly with her then and had seen her on several occasions since then, enough to say hello and wave and that he wanted to go over there and talk to her that morning.

When he got to the house he stated he found the back door open, but he didn't go in. He knocked on the door and Mrs. Bailey answered the door, was dressed in a nightgown and invited him inside and it appeared she hadn't been in bed.

They went to the living room, conversed for quite a while at which time the talk led to sex and she invited him upstairs at which time they had sex orally, anally and natural intercourse and that shortly after that [219] she observed that it was getting light and heard somebody outside getting into a car and told him that he had better leave, to use the back door and asked him if he would take the garbage out to the curb on his way out at which time he said he departed the residence.

Q. Did he mention anything about grape juice?

A. Yes. He said that upon her answering the door and inviting him in that she had asked him if he wanted a glass of grape juice and he declined.

Q. Now, I direct your attention to Tuesday, March 16 and ask you if you had occasion to see the Defendant again at the Delaware Correctional Institute?

A. Yes, sir, I did.

Q. And why did you see him on that day?

A. There had been a message relayed to me from Jerome Franks through Corporal McClements that he wanted me to come up and see him again, that he had forgot to tell me some things.

Q. What did you do on this occasion?

A. Again went up to the Delaware Correctional Center and I asked Jerome what he had wanted.

MR. FINOCCHIARO: Your Honor, excuse me. At [220] this time I would like to get a clarification of the ruling at the bench if I may.

THE COURT: Yes.

(Side bar conference not reported.)

BY MR. TURNER:

Q. Now, Detective Brooks, you have testified you went to the Delaware Correctional Center in response to a message from the Defendant wanting to see you. When you arrived there and after initial conversation what rights if any did you explain to the Defendant?

A. I again advised him that he had the right to remain silent, that anything he chose to say to me could and would be used against him in court at a later date, that he had the right to have an attorney present prior to my asking him any questions and if he couldn't afford an attorney the State of Delaware would provide him one prior to him answering questions.

Q. Now, then what conversation ensued?

A. At this time Jerome told me that he had forgot during our first conversation to tell me that Mrs. Bailey when she answered the door was wearing a very short tight nightie which showed most of her body and that the [221] sex that they had was with her consent, that he had never forced her to do anything and that he had never employed any knife against her to terrorize her in any way.

Q. And what was your reaction to that?

A. I told him that I didn't believe that, that my investigation seemed to point otherwise.

We then conversed about it more and Jerome finally admitted to me that he hadn't really been let into the house by Mrs. Bailey that morning, that he had gone there, he had found the back door open and he had gone into the house.

Once inside the residence he removed a storm window screen from one of the downstairs windows in the dining room of the house and he put it against a building outside, against the side of the house. He intended to take that screen back to his apartment to repair a window back there he had broken.

He said he then went to the second floor of the residence where he found Mrs. Bailey in bed asleep and she awoke. They started a conversation at which time she consented to have sex with him. They had sex as he previously described in his first conversation with me [222] and he left the house.

Q. Now, were you present when Mrs. Bailey viewed photographs at the police station?

A. Yes, sir, I was.

Q. When was that?

A. She viewed some photographs on Friday, March 5, during the afternoon hours and some Saturday, March 6, in the morning hours.

Q. March 5 and March 6?

A. Yes, sir.

Q. About how many photographs were shown to her?

A. I would estimate approximately a thousand.

Q. And that was the afternoon of March 5 and the morning of March 6?

A. Yes, sir.

Q. What county is the residence of Bailey in?

A. Kent County.

MR. TURNER: You may cross-examine.

* * * *

[245] LUCAS—CROSS-EXAMINATION

BY MR. TURNER:

Q. Mr. Lucas, isn't it true that Mr. Franks frequently wore a thermal undershirt and a brown jacket and a dark green knit hat?

A. Yes, I have seen him wear that.

Q. And, Mr. Lucas, at the Youth Center what is [246] your particular capacity?

A. I have been the chief counselor for the six years that it has been open.

Q. Now, when Mr. Franks worked there he didn't work under your direct supervision, did he?

A. No, he did not.

Q. As a matter of fact, you were in an office most of the time, were you not?

A. I was either in the office or in the cell block working.

Q. And Mr. Franks was working out of your vision most of the time?

A. I guess I would have to say yes.

Q. Do you recall on March 4, that is the date before you have testified to, if Mr. Franks was wearing a white thermal undershirt and a green knit cap?

A. I recall the white thermal shirt, but I do not recall the green cap.

Q. How about the leather jacket?

A. I have seen him wear the leather jacket frequently.

Q. On Thursday, March 4, do you recall that he was [247] wearing this leather jacket, State's Exhibit 4?

A. Yes, I recall that.

Q. He was wearing that March 4?

A. Right.

Q. Do you recall on March 4—State's Exhibit 1—a white thermal undershirt. Do you recall whether he was dressed in something like that on March 4?

A. Something like that, yes, sir.

MR. TURNER: No further questions.

REDIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q. Mr. Lucas, you quite frequently saw Mr. Franks wearing other things, too, didn't you?

A. That's correct.

Q. Is there any way you can characterize or give a number as to how often he might have worn a particular shirt?

A. You are talking about the white shirt?

Q. Would you say he wore different things quite often?

A. Yes, he didn't wear the same thing everyday.

MR. FINOCCHIARO: No further questions.

• • • •

[253] FRANKS—DIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q. Mr. Franks, before I go any further I think [254] there is a question that the ladies and gentlemen of the jury have on their mind. Did you have sexual intercourse with Cynthia Bailey on March 5, 1976?

A. Yes, I did.

Q. Was this intercourse voluntary or involuntary?

A. It was voluntary.

Q. Was there any type of force used?

A. No, sir.

Q. Did you employ a knife?

A. No, sir.

• • • •

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 259, 1976

JEROME FRANKS, DEFENDANT BELOW, APPELLANT,

v.

STATE OF DELAWARE, PLAINTIFF BELOW, APPELLEE.

Submitted: March 16, 1977

Decided: April 29, 1977

Before HERRMANN, Chief Justice, DUFFY and McNEILLY, Justices.

Upon appeal from Superior Court. Affirmed.

Donald W. Huntley, Assistant Public Defender, Wilmington, for defendant below, appellant.

Harrison F. Turner, Deputy Attorney General, Dover, for plaintiff below, appellee.

McNEILLY, Justice:

Defendant appeals his conviction by a Superior Court jury of first degree rape, 11 *Del.C.* § 764,* second degree kidnapping, 11 *Del.C.* § 783,** and first degree burglary,

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* 11 *Del.C.* § 764 provides:

"A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and

"(1) In the course of the offense he inflicts serious physical, mental or emotional injury upon the victim, or

"(2) The victim was not the defendant's voluntary social companion on the occasion of the crime and had not previously permitted him sexual contact."

"Rape in the first degree is a class A felony."

** 11 *Del.C.* § 783 provides:

"A person is guilty of kidnapping in the second degree when he unlawfully restrains another person with any of the following purposes:

11 *Del.C.* § 826,*** contending that the Trial Court erred in refusing to hear impeachment testimony at a suppression hearing. We disagree.

I.

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who forced her to perform multiple acts of sexual intercourse with him. The victim later described to the police the clothing worn by the assailant and identified defendant as the assailant.

A search warrant was obtained by the police and used to seize articles of defendant's clothing and a knife, which were introduced at trial over defendant's objection. The Trial Court refused to hear evidence offered at the suppression hearing to impeach the averments of the affidavit used to establish probable cause for the issuance of the search warrant.

"(1) To hold him for ransom or reward; or

"(2) To use him as a shield or hostage; or

"(3) To facilitate the commission of any felony or flight thereafter; or

"(4) To inflict physical injury upon him, or to violate or abuse him sexually; or

"(5) To terrorize him or a third person;

and the actor voluntarily releases the victim alive, unharmed, and in a safe place prior to trial."

"Kidnapping in the second degree is a class B felony."

*** 11 *Del.C.* § 826 provides:

"A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, he or another participant in the crime:

"(1) Is armed with explosives or a deadly weapon; or

"(2) Causes physical injury to any person who is not a participant in the crime."

"Burglary in the first degree is a class B felony."

At trial, defendant did not deny that he had had intercourse with the victim, asserting the defense of consent.

II.

Defendant contends that the Trial Court erred in refusing to hear testimony at the suppression hearing which would have impeached the affidavit establishing probable cause for the search warrant; that this violated the Fourth Amendment prohibition against unreasonable searches and seizures and the requirement that no search warrant shall issue but upon probable cause, supported by oath or affirmation. There is no attack upon the validity of the warrant on its face, and the United States Supreme Court has left open the extent to which a supporting affidavit may be challenged for accuracy. *Rugendorf* v. *United States*, 376 U.S. 528, 531-32, 84 S.Ct. 825, 827-28, 11 L.Ed.2d 887, 891 (1964). The majority of the jurisdictions considering this question have decided that no attack upon the veracity of an underlying affidavit may be made. See 68 Am. Jur.2d *Searches and Seizures* § 66 (1973). We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits. See *State* v. *Petillo*, N.J. Supr., 293 A.2d 649 (1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1393, 35 L.Ed. 2d 611 (1973); *Carter* v. *State*, Md. App., 337 A.2d 415 (1975).

Because of the resolution of this issue there is no need to consider defendant's other contentions, relating to the evidence that would have been introduced for impeachment purposes.

* * * *

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 77-5176

JEROME FRANKS, PETITIONER,

v.

DELAWARE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 11, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1977

NO. 77-5176

JEROME FRANKS,

Petitioner

v.

THE STATE OF DELAWARE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1977

NO. 77-5176

JEROME FRANKS,

Petitioner

v.

THE STATE OF DELAWARE,

Respondent

BRIEF OF THE RESPONDENT, THE STATE OF DELAWARE, IN OPPOSITION TO PETITION OF JEROME FRANKS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

I.

COUNTER-STATEMENT OF QUESTION PRESENTED

Was the trial court's denial of a testimonial hearing to the defendant on a motion to suppress evidence challenging only the veracity of the averments in the affidavit of probable cause for the issuance of a search warrant violative of the Fourth Amendment to the United States Constitution where no preliminary showing of falsity was made?

II.

COUNTER-STATEMENT OF THE FACTS

At trial the entire defense was based on voluntary consent of the victim. The defendant made pre-trial statements in which he admitted being the individual who had entered the victim's home and having had sexual intercourse with her on the date and at the time charged. (App. A-4 - TR. PPS. 215-218) The statements, not under attack here or in the Delaware Supreme Court, were admitted in evidence. The victim provided a positive in-court identification. (App. A-2 - TR. PPS. 76, 77) The defendant under oath testified that he was the one who went to the victim's home and had intercourse with her at the time and on the date alleged. (App. A-7, TR. PPS. 253, 254)

A search warrant, whose validity is not under attack on its face, was utilized by the police to uncover a coat, a pair of pants, thermal undershirt, a hat, and a knife as items which the victim initially described to them as being worn by her assailant. These items were identified by the victim at trial as being exactly like the ones worn or carried by her assailant and were received in evidence. (App. A-3, TR. PPS. 191-196)

A motion to suppress the items recovered in the search was filed by the defendant attacking the search warrant supporting affidavit on the basis of insufficient probable cause and allegations contained therein being merely conclusory. (App. B) No preliminary showing of falsity or intentional misrepresentation was made and when the matter came on for hearing, defense counsel attempted to call witnesses to challenge the veracity of the allegations contained in the affidavit stating his belief that some falsity existed. (App. A-1 - TR. P. 8) The Trial Court denied this application as well as the suppression.

III.

ARGUMENT

A. THE QUESTION PROPOUNDED IN THE PETITION FOR WRIT OF CERTIORARI ASSUMES A FACT UNSUBSTANTIATED BY THE RECORD AND FAILS TO INCLUDE FACTS PERTINENT TO THE RESOLUTION OF THE ISSUE.

Petitioner states the question presented for review as follows:

> " ***** whether the Trial Court erred in refusing to hear testimony at a suppression hearing which would have shown to be untruthful certain allegations of an affidavit made in support of a search warrant."

The record is totally devoid of any showing that the testimony referred to would have shown untruthfulness. In fact the record discloses that defense counsel proffered only his belief that falsity existed in the search warrant affidavit. (App. A-1 - TR. P. 8) Mr. Lucas, one whose information in the search warrant affidavit was believed to be false by defense counsel, did testify for the defense and substantiated the veracity of material contained in the affidavit, (App. A-6 - TR. PPS. 245-247) thereby in at least one area refuting counsel's belief. The motion to suppress and affidavit accompanying it merely recited, "6. The affidavit portion of the search warrant is merely conclusory." (App. B)

This is scarely an initial showing of falsity or other imposition on the warrant issuing judicial officer. Thus the question Petitioner would have his court resolve, by reference to conflicts in the lower courts, is not fairly presented by the facts of the case under consideration. The only such lower court conflict deals with the issue of what falsities in the affidavit would constitute cause for suppression. The following cases are demonstrative of the Point:

1st Circ. - U.S. v. Belculfine, 508 F_2 58 (1974);
2nd Circ. - U.S. v. Gonzalez, 488 F_2 833 (1973);
3rd Circ. - U.S. v. Vento, 533 F.2d 838, 858 (C. A. 3, 1976);
4th Circ. - U.S. v. Lee, 540 F_2 1205 (5/17/76);
5th Circ. - U.S. v. Thomas, 489 F_2 664;
6th Circ. - U.S. v. Luna, 525 F_2 4 (1975);
7th Circ. - U.S. v. Carmichael, 489 F_2 983 (1973);
8th Circ. - U.S. v. Marchart, 492 F_2 897;
9th Circ. - U.S. v. Bolton, 458 F_2 377;
10th Circ. - U.S. v. Harwood, 470 F.2d 322 (10 Cir. 72).

B. THE DECISION BELOW IS CLEARLY CORRECT

While never conclusive of this Court's discretion, the decision below is completely in accord with the law on the point as delineated in all the circuit courts of appeal as well as the overwhelming majority of states that have considered the matter. The law is clearly stated in State v. Petrillo, 293 A_2 649, (N.J. 1972) cert. denied 410 U.S. 945, 93 S. Ct. 1393, 35 L.Ed.2d 611 (1973) as follows:

> "Some Federal Courts and the New York Court of Appeals have indicated that a defendant may be granted a hearing with respect to the truth of a legally sufficient affidavit for a search warrant but only when there has been an initial showing of falsehood or other imposition on the [Judge]' who issued a warrant; U.S. v. Dunning, 425 F.2d 836, 839-840; (2nd Cir. 69) cert. denied 397 U.S. 1002, 90 S. Ct. 1149, 25 L.Ed.2d 412 (1970); U.S. v. Thornton, 454 F.2d 957, 966-970, (D.C. Cir. 1971); U.S. v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966); People v. Alfinito, 16 N.Y.2d 181, 264 N.Y.S.2d 243, 211 N.Ed.2d 644 (1965). Even these cases reject the idea that in every case on a routine demand a hearing may be granted as to the truth of an affidavit."

The factual posture of this case immediately categorizes it as one where no initial showing of falsehood or other imposition on the magistrate issuing the warrant was made. See Argument I. As such there is obviously no conflict between the decision below and the established law on the issue in Federal and majority state court decisions. As noted by the Delaware Supreme Court in its review of this case, Franks v. State, 373 A_2 578, 579:

> "The majority of the jurisdictions considering this question have decided that no attack of an underlying affidavit may be made. See 68 Am.Jur.2d Searches and Seizures §66 (1973)."

C. THE CASE INVOLVED MAY BE RESOLVED WITHOUT REFERENCE TO OR RESOLUTION OF THE 4TH AMENDMENT ISSUE ATTEMPTED TO BE PRESENTED

While investigating the complaint of rape, robbery, etc., the police received a fairly comprehensive description of the perpetrator including the clothes he was wearing at the time. With sufficient probable cause a search warrant was obtained and executed recovering the items later moved to be suppressed. Subsequently the defendant gave the police two statements admitting his identity as the one of whom the victim complained. (App. A-4 - TR. PPS. 215-218) Defense counsel in his opening address to the jury did not deny intercourse between defendant and victim but advanced the issue of adults mutually consenting to the act. (App. C) The victim positively identified the defendant at trial (App. A-2 - TR. PPS. 76-77) and the defendant under oath admitted his identity as the participant in the intercourse with the victim. (App. A-7 - TR. PPS. 253, 254) The introduction of the clothing and knife, fruits of the search

warrant, could not by any stretch of the imagination, have had any influence on establishing the identity of the defendant which was the only possible purpose of the introduction of the questioned items at trial. Thus error if any was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, resulting on a resolution of this case without recourse to the 4th Amendment constitutional question. Certiorari in such case would be improvidently granted. Alma Motor Co. v. Timken Co., 329 U.S. 129.

D. THIS COURT HAS CONSISTENTLY DENIED CERTIORARI ON THE ISSUE IT IS CALLED UPON TO DECIDE BY THIS CASE

In this area Respondent directs the Court's attention to, among others, the following cases: People v. Bak, 400 U.S. 882, 258 N.E.$_2$ 341, 91 Set. 117, 27 L.Ed.2d 121 (1970); State v. Anselmo, 407 U.S. 911, 92 S. Ct. 2438, 32 L.Ed.2d 685 (6/12/72); Tucker v. Maryland, 386 U.S. 1024, 87 S. Ct. 1381, 18 L.Ed.2d 463 (67); Smith v. N.J., 336 U.S. 925, 69 S. Ct. 656, 93 L.Ed.2d 1087 (49); Stansberry v. Ill., 404 U.S. 873; Petillo v. N.J., 410 U.S. 945, 93 S. Ct. 1393, 35 L.Ed.2d 611 (73).

The instant case in view of the foregoing infirmities must present less persuasive reasons for this Courts consideration than many of the cases previously denied certiorari.

IV. CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Richard R. Wier, Jr.
Attorney General
Department of Justice
American-International Building
12th & Market Streets
Wilmington, Delaware 19801

Harrison F. Turner
Deputy Attorney General
Department of Justice
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Dover, Delaware 19901

Attorneys for the Respondent

DATED: August 17, 1977

APPENDIX A

1. Transcript Record P. 8
2. Transcript Record PPS. 76-77
3. Transcript Record PPS. 191 - 196
4. Transcript Record PPS. 215-218
5. Transcript Record PPS. 220-221
6. Transcript Record PPS. 245-247
7. Transcript Record PPS. 253-254

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MR. FINOCCHIARO: Yes, Your Honor. Would you like for me to limit myself -- or, first of all I will address what Colonel Turner has stated.

THE COURT: Not yet. Why don't you make your proffer and then we can delineate the issues.

MR. FINOCCHIARO: Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center and Mr. James Morrison, formerly of the Delaware Youth Center, who I believe will give information that will intend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.

THE COURT: That would be of what paragraph? Paragraph 15?

MR. FINOCCHIARO: Yes, Paragraphs 15, 16 and 17.

THE COURT: And what they would testify to would rebut what is in Paragraph 15, 16 and 17.

MR. FINOCCHIARO: Would rebut not only certain

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were found not to be impermissibly, or not inadmissible I should say.

THE COURT: The issue for me at the present time is that of a request for voir dire. The request for voir dire is hereby denied. However, I am not denying the opportunity to the Defendant to make a later motion to strike at any time, either at the end of the State's examination of the witness or on cross-examination by the Defendant. Anything further, counsel?

MR. FINOCCHIARO: No, Your Honor.

THE COURT: The witness may return to the stand and the jury may come into the courtroom.

(The witness resumed the stand.)

(The jury returned to the courtroom.)

BY MR. TURNER:

Q Now, Mrs. Bailey, is the individual who intruded into your home and is the subject of what I have related present here in the courtroom?

A Yes.

Q Would you point him out, please?

A This person here (indicating).

MR. TURNER: Let the record reflect that the witness has pointed out the Defendant and identified him.

BY MR. TURNER:

Q. Approximately how long did you have an opportunity to observe him when the lighting conditions had reached daylight?

A. As far as I can recall it could have been no longer than ten to fifteen minutes.

Q. Now, when the refrigerator door was open, did you have an opportunity to observe him at that time?

A. Yes. That is when I first made notice especially of the clothing.

Q. And approximately how long was that?

A. One minute.

Q. Now, at all times throughout this entire period what was the furtherest away you were able to get from the Defendant throughout the entire period?

A. Probably a distance of four feet at the most.

Q. At the most?

A. Yes.

Q. That is he was constantly with you throughout the entire period you have related?

A. Yes.

Q. Now, you were with him approximately one and a

sorry -- but he didn't know a Bailey.

BY MR. TURNER:

Q Now, on March 9 what did you do in connection with this investigation reference to search warrant?

A We executed a search warrant on Jerome Franks' apartment at 222 South Governor's Avenue at which time clothing was confiscated matching the description of the clothing that the suspect in the rape had been wearing.

Q At this point I show you State's for Identification A and ask you what significance this might have to you?

A This was confiscated during the execution of the search warrant.

Q Can you identify that as being the object of the search warrant or recovered on the search warrant?

A Yes, sir, I can. It bears an evidence tag filled out by myself.

Q By whom?

A By myself.

MR. TURNER: At this point I move State's Identification A into evidence as Exhibit 1.

MR. FINOCCHIARO; Your Honor, I believe my

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objection has previously been made on the basis of the search, and I object to it on that ground. In addition, I question the fact that Mrs. Bailey is not sure precisely that it was -- could not identify this as being something other than similar to what that alleged intruder was wearing. For those two reasons I object to its entry.

THE COURT: What purpose is it being introduced?

MR. TURNER: It is being introduced in conjunction as proof of what was found on the search warrant, answering the description that this officer had of the clothes that were worn by the Defendant.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 1.

(White thermal undershirt previously marked "State's Exhibit A, for Identification" marked "State's Exhibit No. 1" and received in evidence.)

BY MR. TURNER:

Q I now show you State's for Identification B and ask you what significance that has to you?

A This was also found in Jerome Franks' apartment. during the execution of the search warrant. It bears the evidence tag that I filled out at the time.

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MR. TURNER: Move State's for Identification B into evidence as State's Exhibit 2.

MR. FINOCCHIARO: Again, Your Honor, I have the same objections as previously stated.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 2.

(Hat previously marked "State's Exhibit B, for Identification" marked "State's Exhibit No. 2" and received in evidence.)

BY MR. TURNER:

Q I now show you State's for Identification C and ask you if you can identify that.

THE COURT: B for Identification will be admitted for the same purpose as A?

MR. TURNER: Yes, Your Honor.

THE WITNESS: This was also found in Jerome Franks' apartment by myself and marked as evidence. It bears my evidence tag.

MR. TURNER: Move to introduce into evidence State's Exhibit C as State's 3.

MR. FINOCCHIARO: Again, Your Honor, the same objections.

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THE COURT: And introduced for the same purposes as A and B?

MR. TURNER: Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 3.

(Pants previously marked "State's Exhibit C, for Identification" marked "State's Exhibit No. 3" and received in evidence.)

BY MR. TURNER:

Q State's for Identification D, what significance does that have to you?

A This was also found in Jerome Franks' apartment by myself and does bear my evidence tag.

MR. TURNER: Move to introduce into evidence State's for Identification D as State's Exhibit 4.

MR. FINOCCHIARO: Your Honor, same objections.

MR. TURNER: Same reasons.

THE COURT: Introduced for the same purposes?

MR. TURNER: Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 4.

((Coat : previously marked "State's Exhibit D,

for Identification" marked "State's Exhibit No. 4" and received in evidence.)

BY MR. TURNER:

Q I now show you State's for Identification D -- I'm sorry, E, and ask you what significance that may have to you.

A This was found on the kitchen table of Jerome Frank' apartment during the execution of the search warrant marked with my evidence tag.

MR. TURNER: Move for introduction as State's Exhibit 5, State's for Identification E.

MR. FINOCCHIARO: Your Honor, I object to it on the same grounds. In addition, I believe that Cynthia Bailey indicated that she saw a knife in pitch blackness and apparently merely gave a description of it as being a knife. I question the evidenciary value of something found in the apartment without something more to designate that was the one allegedly used.

MR. TURNER: That is a jury question, the weight to be attached to it, Your Honor.

THE COURT: What purpose is it being introduced?

MR. TURNER: I represent it is being introduced

for the same purpose as all the other exhibits as found in the search warrant by this officer as being under a description that he had at that time.

THE COURT: For that purpose it will be admitted into evidence as State's Exhibit No. 5.

(Knife previously marked "State's Exhibit E, for Identification" marked "State's Exhibit No. 5" and received in evidence.)

BY MR. TURNER:

Q Now, in connection with State's Exhibit No. 5, did you thoroughly search the Defendant's Jerome Franks' apartment at the time you executed the search warrant?

A Yes, sir, I did.

Q Was any other knife evidence in the apartment at that time?

A No, sir, there wasn't.

Q This was the only knife?

A Yes, sir.

Q In connection with State's Exhibit 3, is there anything significant about the belt and buckle attached to that as related to your investigation?

A Mrs. Bailey described the pants worn by the

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MR. FINOCCHIARO: I think my position is quite simply we only have one thing in black and white, only one type of document which can't be changed. It is there. That indicates only two rights were given.

As such, I think it is a violation of Miranda rights. I think we do have a situation -- the Court is obviously aware and I am not making any suggestion about Detective Brooks, but anyone anywhere could say they said a particular thing and there is no way to contradict them. Here, however, we do have something in writing which indicates quite frankly that two of the rights were not given. I think that should be controlling under these circumstances.

THE COURT: State's motion is granted.

(End of voir dire examination.)

THE COURT: Bring in the jury.

(The jury returns to the courtroom.)

DIRECT EXAMINATION (Cont'd)

BY MR. TURNER:

Q Detective Brooks, just prior to the jury retiring I had asked you on Wednesday, March 10, in the early afternoon, did you contact the Defendant at the

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Delaware Correctional Center?

A Yes, sir, I did.

Q Now, what conversation did you have with the Defendant at that time?

A I first told Mr. Franks that I was there because I was investigating a rape in Dover and he was a suspect in it at that time. I then advised him that I would like to talk to him, but he had the right to remain silent, anything that he chose to say could and would be used against him in court at a later time, that he had the right to have an attorney present prior to my asking him questions and that if he could not afford an attorney the State of Delaware would provide one for him prior to him answering questions.

Q What was his reply?

A He replied that he didn't want an attorney, that he knew his rights better than I did and I proceeded to ask him questions.

Q What questions did you ask him? What were his answers?

A He at first told me that he didn't know anything about any rape and didn't know anybody by the name of

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Cynthia Bailey. At that time I told him quite frankly I didn't believe him. We had executed a search warrant of his apartment and that I had found clothing fitting the description given by our victim and that I felt that I could place him at the house and it was at this time that he told me that Yes, he was at the house, that he had been there 5:00 in the morning on the fifth of March because he was aware that Mrs. Bailey's husband worked at night.

He had told me that he had met her up around Wesley College prior to this and talked shortly with her then and had seen her on several occasions since then, enough to say hello and wave and that he wanted to go over there and talk to her that morning.

When he got to the house he stated he found the back door open, but he didn't go in. He knocked on the door and Mrs. Bailey answered the door, was dressed in a nightgown and invited him inside and it appeared she hadn't been in bed.

They went to the living room, conversed for quite a while at which time the talk led to sex and she invited him upstairs at which time they had sex orally, anally and natural intercourse and that shortly after that

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this time I would like to get a clarification of the ruling at the bench if I may.

THE COURT: Yes.

(Side bar conference not reported.)

BY MR. TURNER:

Q Now, Detective Brooks, you have testified you went to the Delaware Correctional Center in response to a message from the Defendant wanting to see you. When you arrived there and after initial conversation what rights if any did you explain to the Defendant?

A I again advised him that he had the right to remain silent, that anything he chose to say to me could and would be used against him in court at a later date, that he had the right to have an attorney present prior to my asking him any questions and if he couldn't afford an attorney the State of Delaware would provide him one prior to him answering questions.

Q Now, then what conversation ensued?

A At this time Jerome told me that he had forgot during our first conversation to tell me that Mrs. Bailey when she answered the door was wearing a very short tight nightie which showed most of her body and that the

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sex that they had was with her consent, that he had never forced her to do anything and that he had never employed any knife against her to terrorize her in any way.

Q And what was your reaction to that?

A I told him that I didn't believe that, that my investigation seemed to point otherwise.

We then conversed about it more and Jerome finally admitted to me that he hadn't really been let into the house by Mrs. Bailey that morning, that he had gone there, he had found the back door open and he had gone into the house.

Once inside the residence he removed a storm window screen from one of the downstairs windows in the dining room of the house and he put it against a building outside, against the side of the house. He intended to take that screen back to his apartment to repair a window back there he had broken.

He said he then went to the second floor of the residence where he found Mrs. Bailey in bed asleep and she awoke. They started a conversation at which time she consented to have sex with him. They had sex as he previously described in his first conversation with me

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fashion?

A No, not that I could notice.

Q Was there any noticeable difference between Mr. Franks on March 5, 1976 as opposed to any other day?

A Not that I could determine.

Q Was he acting peculiar in any fashion that you could determine?

A No.

Q To the best of your knowledge did he work all day?

A On that night?

Q He did go to work at approximately 7:30; is that right?

A That's correct.

MR. FINOCCHIARO: I have no further questions.

CROSS-EXAMINATION

BY MR. TURNER:

Q Mr. Lucas, isn't it true that Mr. Franks frequently wore a thermal undershirt and a brown jacket and a dark green knit hat?

A Yes, I have seen him wear that.

Q And, Mr. Lucas, at the Youth Center what is

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your particular capacity?

A I have been the chief counselor for the six years that it has been open.

Q Now, when Mr. Franks worked there he didn't work under your direct supervision, did he?

A No, he did not.

Q As a matter of fact, you were in an office most of the time, were you not?

A I was either in the office or in the cell block working.

Q And Mr. Franks was working out of your vision most of the time?

A I guess I would have to say yes.

Q Do you recall on March 4, that is the date before you have testified to, if Mr. Franks was wearing a white thermal undershirt and a green knit cap?

A I recall the white thermal shirt, but I do not recall the green cap.

Q How about the leather jacket?

A I have seen him wear the leather jacket frequently.

Q On Thursday, March 4, do you recall that he was

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wearing this leather jacket, State's Exhibit 4?

A Yes, I recall that.

Q He was wearing that March 4?

A Right.

Q Do you recall on March 4 -- State's Exhibit 1 -- a white thermal undershirt. Do you recall whether he was dressed in something like that on March 4?

A Something like that, yes, sir.

MR. TURNER: No further questions.

REDIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q Mr. Lucas, you quite frequently saw Mr. Franks wearing other things, too, didn't you?

A That's correct.

Q Is there any way you can characterize or give a number as to how often he might have worn a particular shirt?

A You are talking about the white shirt?

Q Would you say he wore different things quite often?

A Yes, he didn't wear the same thing everyday.

MR. FINOCCHIARO: No further questions.

consultation with a lawyer, would also be inadmissible. Since the Court ruled initially it was admissible, I did not go any further in that area.

I would also like to state that when the Attorney General offered into evidence the written statement I stated no objections. It is in terms of no objections in addition to what I previously stated during my voir dire.

THE COURT: All right. So noted for the record. Anything further before the jury comes in?

MR. FINOCCHIARO: I have nothing further.

THE COURT: You may bring in the jury.

(The jury entered the courtroom and took their respective seats in the jury box.)

MR. FINOCCHIARO: Your Honor, Defense would call Jerome Franks.

JEROME FRANKS

JEROME FRANKS, called on his own part and behalf, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q. Mr. Franks, before I go any further I think

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there is a question that the ladies and gentlemen of the jury have on their mind. Did you have sexual intercourse with Cynthia Bailey on March 5, 1976?

A Yes, I did.

Q Was this intercourse voluntary or involuntary?

A It was voluntary.

Q Was there any type of force used?

A No, sir.

Q Did you employ a knife?

A No, sir.

Q Let's back up for a moment. Mr. Franks, how old are you, sir?

A 21.

Q I think you may have to speak up just a little bit.

A 21.

Q Where do you live?

A 222 South Governor's Avenue.

Q And where is that in relation to 132 North Street?

A About one hundred yards away.

Q And where are you employed?

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APPENDIX B

Motion to Suppress Evidence and Supporting Affidavit

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE,	:	
Plaintiff,	:	CR. A. NO. IK-76-03-0120, -0121, -0122.
vs.	:	
JEROME FRANKS,	:	
Defendant.	:	

MOTION TO SUPPRESS EVIDENCE
AND REQUEST FOR HEARING

COMES NOW, the Defendant, Jerome Franks, through his attorney, David D. Finocchiaro, Assistant Public Defender, in the above-captioned case, and moves, pursuant to Rule 41(e) of the Superior Court Criminal Rules, to suppress any evidence seized from him as a result of a search of his residence, occurring on or about the 9th day of March, 1976. Said search resulted in the seizure of items of clothing, a knife, and miscellaneous items.

The search and seizure was unlawful for the following reasons:

1. On or about March 9, 1976, the Defendant, Jerome Franks, was residing at 222 S. Governors Avenue, Apartment #3, Dover, Delaware.

2. On or about March 9, 1976, members of local police forces conducted a search of his residence.

3. No permission was given by the Defendant or anyone to permit a search of his apartment.

4. The search was not incident to a lawful arrest.

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5. The search warrant used was legally insufficient in that it did not show sufficient probable cause.

6. The affidavit portion of the search warrant is merely conclusory.

7. Said search resulted in the seizure of items of clothing, a knife and miscellaneous items.

8. Certain items seized were not in plain view.

WHEREFORE, the Defendant, pursuant to Rule 47 of the Superior Court Criminal Rules, requests a hearing for the Court to consider if the aforesaid search and seizure was in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States and of Articles 1 and 6 of the Delaware Constitution of 1897, as amended.

David D. Finocchiaro

DAVID D. FINOCCHIARO
Assistant Public Defender
101 Court Street
Dover, Delaware 19901

DATED: 7/27/76

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE,	:	
Plaintiff,	:	CR. A. NO. IK-76-03-0120, -0121, -0122.
vs.	:	
JEROME FRANKS,	:	AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS
Defendant.	:	

STATE OF DELAWARE)
) SS.
COUNTY OF KENT)

BE IT REMEMBERED, that on this___day of_____, A.D., 1976, personally appeared before me, the Subscriber, a Notary Public for the State and County aforesaid, JEROME FRANKS, being duly sworn, depose and say:

1. That on or about March 9, 1976, the Defendant, Jerome Franks, was residing at 222 South Governors Avenue, Apartment #3, Dover, Delaware;

2. That on or about March 9, 1976, members of local police forces conducted a search of his residence;

3. That no permission was given to permit a search of his apartment;

4. That the search was not incident to a valid arrest.

5. That the search warrant used was legally insufficien in that it did not show sufficient probable cause;

6. That the affidavit portion of the search warrant is merely conclusory.

7. That said search resulted in seizure of items of clothing, a knife, and miscellaneous items.

8. That certain items seized were not in plain view.

JEROME FRANKS

SWORN TO AND SUBSCRIBED by me the day and year aforesaid.

, Notary Public

APPENDIX C

Excerpt from Defendant's opening statement.

SUPERIOR COURT REPORTERS
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DOVER, DELAWARE 19901

August 2, 1976
Superior Courtroom
2:12 o'clock p.m.

PRESENT: As noted.

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MR. FINOCCHIARO: . . . Now, as suggested by the prosecutor, I believe that the ultimate issue today or tomorrow, as the case may be, will not necessarily be whether there was intercourse or not as it may be in some cases, but whether or not what was done was done by two consenting adults or, in other words, was it voluntary? Was it involuntary? Was there force used? Was there no force used? These are the elements that are going to have to be decided ultimately by you throughout this trial.

Now, the defense will present its version of what happened on March fifth. I would predict that in certain areas it may coincide with that of the State and in other areas it may differ rather dramatically.

Now, in doing so defense will tell what Mr. Franks did or did not do on March fifth. I think what may be equally as important is what Cynthia Bailey did or did not do. This gentleman is sitting here today presumed innocent.

- - - - -

Supreme Court, U. S.
FILED
NOV 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

BRIEF FOR PETITIONER

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CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of the State of Delaware is reported at 373 A.2d 578 (1977), and is set out in the Appendix (A. 38-40).

JURISDICTION

The jurisdiction of this Court is invoked on the basis that a right, privilege or immunity is claimed under the United States Constitution, and the decision in the Supreme Court of the State of Delaware was against the right, privilege or immunity.

The judgment in the court below was entered on May 2, 1977. No order respecting a rehearing nor any order granting an extension of time within which to petition for Certiorari was granted. The petition was filed on July 29, 1977. Certiorari and leave to proceed in forma pauperis were granted on October 11, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

The Constitutional provision which the case involves is the Fourth Amendment to the United States Constitution, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This provision is found in Volume 1, page XLVIII of the Official Edition.

The case further involves the Fourteenth Amendment to the United States Constitution, Section 1, which reads as follows:

> "All persons born or in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This provision is found in Volume 1, page XLIX of the Official Edition.

QUESTION PRESENTED

Did the Trial Court, in refusing to hear testimony at a suppression hearing which would have shown to be untruthful certain averments of an affidavit made in support of a search warrant, act contrary to the Fourth Amendment of the United States Constitution?

STATEMENT OF THE CASE

The Petitioner appealed his conviction of First Degree Rape, Second Degree Kidnapping, and First Degree Burglary, on the ground that the Trial Court erred in refusing to hear certain testimony at a suppression hearing. The conviction was affirmed on appeal by the Delaware Supreme Court (A. 38).

According to the victim, she was confronted in her home, at about 5:00 a.m., by a knife-wielding assailant who forced her to perform multiple acts of sexual

intercourse with him. The victim later described to the police the clothing worn by the assailant, and identified the Petitioner as the assailant. (A. 39).

A search warrant was obtained by the police and used to seize articles of Petitioner's clothing and a knife. (A. 5). A motion to suppress the items seized in the search was filed by the defendant (A. 11). At the subsequent suppression hearing the Trial Court refused to hear the testimony of two witnesses to impeach the veracity of the affidavit used to establish probable cause for the issuance of the search warrant. (A. 14). The items seized in the search were received in evidence at trial over Petitioner's objection. (A. 24-32).

SUMMARY OF THE ARGUMENT

This Court has previously concluded that evidence seized in violation of the Fourth Amendment must be excluded from Federal and State Courts. Search warrants based on affidavits containing willful or negligent misstatements do not satisfy the Fourth Amendment requirement of probable cause. The evidence seized pursuant to such warrants should therefore similarly be excluded, since no alternative remedy would satisfy the Constitutional purpose. At a suppression hearing, the defendant should be afforded a full opportunity to expose such misstatements, as opposed to the heretofore limited right in many jurisdictions to attack only the sufficiency of the averments of the affidavits.

ARGUMENT

I.

EVIDENCE SEIZED CONTRARY TO THE FOURTH AMENDMENT CANNOT BE INTRODUCED AT TRIAL.

This Court, in *Weeks v. United States*[1] and *Mapp v. Ohio,*[2] required the exclusion from Federal and State Courts, respectively, of evidence seized in violation of the Fourth Amendment to the U.S. Constitution. That Amendment prohibits "unreasonable searches" and declares that "...no warrants shall issue, but upon probable cause, supported by oath or affirmation...".

In the *Mapp* case, in affirming the applicability of this Exclusionary Rule to the States, this Court said,

> "Because [the Fourth Amendment] is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."[3]

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[1] 232 U.S. 383 (1914).

[2] 367 U.S. 643 (1961).

[3] *Supra* at 367 U.S. 660.

II.

FALSE AFFIDAVITS SUPPORTING A SEARCH WARRANT DO VIOLENCE TO THE FOURTH AMENDMENT AT LEAST EQUAL TO THE INSUFFICIENCY OF A SEARCH WARRANT AFFIDAVIT.

The function of the Bill of Rights in general and of the Fourth Amendment in particular is to chart a course between a free society and a safe one.[4] If the members of a society never inflicted injury, all searches and seizures could be prohibited as pointless intrusion into personal liberty. However, in the interest of a safe society, some searches and seizures must be tolerated as a necessary evil. The Fourth Amendment limits those intrusions to situations where probable cause exists.

In accordance with Delaware practice and Rule 41(e)(4) of the Federal Rules of Criminal Procedure, an aggrieved person may move to suppress evidence on the basis that there was not probable cause for believing the existence of the grounds on which the warrant was issued. Reason dictates that a determination of probable cause would involve the exploration of the accuracy as well as the sufficiency of the allegations in a supporting affidavit. However, many State Courts have disallowed any challenge to the factual validity of an affidavit supporting a search warrant, and a number of Federal Courts have held that a finding of probable cause by a United States Commissioner is conclusive unless arbitrary, and thus not subject to challenge on the basis of

[4] *Gerstein v. Pugh*, 420 U.S. 103, 112-114 (1975).

the supporting affidavit's inaccuracy.[5] Other decisions, more in keeping with the fundamental purpose of the Fourth Amendment, conclude that "False facts given by the affiant will vitiate the warrant and the search."[6]

The fundamental purpose of an affidavit in support of a search warrant is to provide the basis for determining whether probable cause for the requested search actually exists. Just as this determination cannot be made from a facially insufficient affidavit, the magistrate cannot make the requisite determination of probable cause on the basis of a facially sufficient but misrepresentative affidavit.[7] Both sufficiency and accuracy of the affidavit are therefore necessary to meet the Fourth Amendment requirement of probable cause.

III.

JUDICIAL REVIEW OF THE TRUTH OF AN AFFIDAVIT SUPPORTING A SEARCH WARRANT IS ESSENTIAL TO GIVE MEANING TO THE FOURTH AMENDMENT GUARANTEES.

Our judicial system is based on the wisdom and inherent fairness of an adversary proceeding; one in

[5] *Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946); *Gracie v. United States*, 15 F.2d 644 (1st Cir.), cert. denied, 237 U.S. 748 (1926); *United States v. Gianaris*, 25 F.R.D. 194 (D.D.C. 1960); *United States v. Doe*, 19 F.R.D. 1 (E.D. Tenn. 1956).

[6] *King v. United States*, 282 F.2d 398, 400 (4th Cir. 1960).

[7] *State of New Hampshire v. Spero*, 371 A.2d 1155, 1158 (1977).

which both parties in interest have the opportunity to present their case to an impartial trier of fact. The concept of a final *ex parte* proceeding was so repugnant to the framers of our Constitution that they included specific prohibitions against bills of attainder[8] that had been so cruelly misused in the past.

The initial hearing for the granting of a search warrant is necessarily an *ex parte* proceeding. Prior notice of a hearing regarding the initial granting of a search warrant would undoubtedly result in the removal or destruction of evidence. In this *ex parte* proceeding, however, a judicial determination is made regarding probable cause. The Constitution requires that probable cause exist. This necessarily means that the granting of the search warrant entails a determination of both the sufficiency and accuracy of the allegations in the application. The suppression hearing is the only opportunity that the defendant has, in his criminal proceeding, to present evidence negating that previously offered by the State about the accuracy of these allegations.

As discussed in a dissenting opinion by Mr. Justice Schaefer of the Illinois Supreme Court,

> "If there can be no subsequent inquiry into the truth of those facts [relied upon to establish probable cause], the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' is protected only by an unreviewable ex parte determination of the lowest officer of the judicial hierarchy.... I cannot bring myself to believe that

[8]United States Constitution, Article I, §9.

> this was the probable cause, supported by Oath required by the Fourth Amendment."[9]

It is submitted that the relegation of such an important facet of the determination of a probable cause to a final, *ex parte* procedure is contrary to our adversary judicial system and a fundamental concept of fairness.

IV.

THE ARGUMENTS ADVANCED AGAINST SUCH REVIEW FAIL TO WITHSTAND SCRUTINY.

Of those cases which have denied the opportunity to challenge the truth and accuracy of the facts alleged in an affidavit, the reasoning supporting such holdings does not generally appear in the reported decisions. Typical is Tucker v. State of Maryland[10] in which the Court held simply that they were not persuaded that earlier cases were wrongly decided.[11] Another such decision was Smith v. State[12] in which the Court, without elaboration, held

> "The better rule seems to be that the court's consideration of the showing of probable cause

[9]People v. Mitchell, 45 Ill. 2d 148, 155, 258 N.E.2d 345, 349, certiorari denied, 400 U.S. 882, 91 S.Ct. 117 (1970).

[10]224 A.2d 111 (1966).

[11]*Ibid.*, page 118.

[12]191 Md. 329, 62 A.2d 287, cert. den. 336 U.S. 925, 69 S. Ct. 656 (1949).

should be confined solely to the affidavit itself, and the truth of the alleged grounds cannot be controverted, as was done in the instant case, by receiving the testimony of the accused and other witnesses."[13]

A variety of arguments have, however, been advanced against any judicial review of the truth of the allegations made in support of the search warrant.

It has been suggested that the warrant-issuing process so adequately protects Fourth Amendment values that review at a suppression hearing is unnecessary.[14] This reasoning ignores the realities of an *ex parte* proceeding, marked by haste, with no defense advocate present even to suggest that inquiry be made into the truth of a supporting affidavit.

Another argument against sub-facial attacks at a suppression hearing is that such review would destroy the solemnity of the warrant-issuing process and would result in the unseemly spectacle of one judge reviewing the decision of another.[15] The warrant-issuing process is, at best, no more solemn than any other judicial decision. Moreover, the truth of the allegations supporting a search warrant would, most often, be considered for the first time at a suppression hearing. The suppression of evidence on this ground would therefore be on the basis of the magistrate being deceived, rather than his having made a mistake.

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[13]*Ibid.* 62 A.2d 289.

[14]*State v. Petillo*, 61 N.J. 165, 174, 293 A.2d 649, 653 (1972), cert. denied, 410 U.S. 945 (1973).

[15]Note, Testing the Factual Basis for a Search Warrant, 67 Col. L. Rev. 1529, 1530 (1967).

Still other arguments against sub-facial attacks are easily resolved by sound judicial procedure. It has been suggested that inquiry into the truth of the search warrant affidavit at a suppression hearing would confuse the defendant's guilt with the preliminary issue of whether someone misrepresented information in an affidavit.[16] Clearly, a jury should not be present during the course of a suppression hearing. The importance of protecting the identity of informants has also been advanced as a reason for limiting the scope of review of search warrant affidavits. This protection, where needed, can be afforded by review of witnesses *in camera*, with separate, confidential records of the proceeding.

V.

THE PROPOSED ALTERNATIVES TO A FULL ADVERSARY DETERMINATION OF PROBABLE CAUSE AT A SUPPRESSION HEARING ARE PATENTLY UNSATISFACTORY.

It has been suggested repeatedly that a defendant has a remedy against an officer who makes untruthful statements to support a search warrant, in that a criminal action for perjury or civil action for damages are available. However, this Court considered and rejected such arguments many years ago. Then, in reviewing whether it is necessary to exclude evidence obtained without a search warrant, Mr. Justice Black said, in *Mapp v. Ohio*,

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[16]*Supra.*

> "There are, of course, other theoretical remedies. One is disciplinary action with the hierarchy of the police system, including prosecution of the police officer for a crime. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates ordered."[17]

Moreover, the law of perjury would be clearly inapplicable to those search warrant affidavits that recount the observation not only of the affiant but of an informant who has given information to the affiant. If it is the informant who is the source of false information, the informant will not have given the information under oath, as the law of perjury requires.[18] Further, even if the affiant made the misrepresentations, the law of perjury would not deal with reckless or negligent misstatements.

VI.

A REQUIREMENT FOR A PRELIMINARY SHOWING OF FALSITY WOULD IMPOSE AN UNREASONABLE BURDEN ON A DEFENDANT.

Many of the courts that permit attack on the validity of a search warrant affidavit force the defendant to jump a preliminary hurdle. They refuse to give the

[17] *Supra*, note 2.

[18] R. Perkins, Criminal Law 454, 456, 458-60 (2d ed. 1969).

defendant a hearing unless he makes a preliminary showing that the hearing may be fruitful.[19] The requirement ranges in stringency from "... some initial showing of some sort – some suggestion of a basis or area of doubt ..."[20] to "a showing of falsity of allegation – a showing presumable not easily to be made in most cases."[21] The Model Code of Pre-Arraignment Procedure sets forth such a requirement as follows:

> "The moving party shall be allowed to make the contest ... only upon preliminary motion, supported by affidavit, setting forth substantial basis for questioning the good faith of the testimony, and such party shall have the burden of proving the lack of good faith."[22]

It is submitted that such a burden, in a typical case, would be unfair to a criminal defendant. In rare cases, the present one included, the defendant is prepared to go forward with concrete evidence of the falsity of one or more allegations of the affidavit. However, in most cases a defendant has neither specific evidence nor the means to get specific evidence of false allegations, since most jurisdictions do not permit discovery depositions in criminal cases.[23] A likely basis for many sub-facial

[19] *United States v. Belculfine*, 508 F.2d 58 (1st Cir. 1974); *United States v. Carmichail*, 489 F.2d 983 (7th Cir. 1973); *United States v. Halsey*, 257 F. Supp. 1002 (S.D. N.Y. 1966).

[20] *United States v. Halsey, supra.*

[21] *United States v. Belculfine, supra* at 508 F.2d 63 (1st Cir. 1974).

[22] Section SS 290.3(1)(b).

[23] Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure 1237-38 (1974).

attacks would be that the affiant misrepresented either the information conveyed by an informant or the informant's reliability. Absent compulsory process, such information is only available through examination of the affiant at a suppression hearing. A procedural requirement of a preliminary showing would therefore have the same effect, in such cases, as barring any sub-facial attack whatever. Such a situation would leave the defendant with a valid Fourth Amendment right but no means to enforce it.

VII.

THE EVIDENCE INTRODUCED IN VIOLATION OF THE PETITIONER'S FOURTH AMENDMENT RIGHTS SIGNIFICANTLY PREJUDICED HIS CAUSE.

In the application for the search warrant issued on March 9, 1976, eighteen facts were alleged to establish probable cause.[24] Of those eighteen facts, it is submitted that only three, Nos. 15, 16 and 17, would provide basis for the belief that physical evidence connected with the crime might be found in the searched premises. These three statements were based on alleged conversations with Mr. James Williams and Mr. Wesley Lucas. The defendant had, at the suppression hearing in the trial court, offered the testimony of witnesses to show that no such conversations took place.[25] Accordingly, the court's refusal to

[24] Appendix, pages 6-8.

[25] Appendix, pages 16-17.

hear such evidence bore on issues central to the sufficiency of the affidavit supporting the application for a search warrant.

As a result of the search carried out pursuant to the warrant in question, a knife and several articles of clothing were discovered which generally corresponded to the description of these items by the victim. At trial, they represented the only tangible evidence submitted to the jury. In view of the admission of this evidence, the defendant elected to present an affirmative defense at trial, giving up his right to rest on the insufficiency of the State's case.

CONCLUSIONS

If the Fourth Amendment is to succeed in its stated purpose of protecting the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .," a review of the validity of an affiant's allegations in addition to their sufficiency is required, in accordance with carefully reasoned opinions such as King v. U.S.[26] in which the court concluded, "The constitutional requirement of an oath or affirmation would be effectively eroded away if fictitious oaths were permitted."[27]

Innocent misrepresentations, to the extent that an affiant believed the misrepresentations to be true, do not do violence to the Fourth Amendment. However, it

[26] 282 F.2d 398 (1960).

[27] *Ibid.*, page 399.

is respectfully submitted that every material misstatement made either intentionally or negligently by an affiant should require exclusion of the evidence obtained as a result of such misstatement.

Over sixty years ago, this Court considered whether it was constitutionally permissible to introduce evidence obtained without a search warrant. Mr. Justice Day then concluded that if materials so obtained could be "used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and . . . might well be stricken from the Constitution."[28]

We might sympathize with an officer who enters without a warrant on the certain belief that the fruits or instruments of a crime lie within. How can we tolerate, however, the officer who would willfully or negligently advance a false statement to obtain a search warrant? Without a mechanism to guard against such abuse, our Fourth Amendment rights would very well be "of no value, and might well be stricken from the Constitution." Provisions for judicial review and exclusion of evidence are necessary to deter such intentional or negligent misstatements and to adequately preserve the constitutionally guaranteed rights against unreasonable searches and seizures.

In view of the central role of the evidence presently in question at trial, the Petitioner prays that the decision of the Delaware Supreme Court be reversed,

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[28] *Weeks v. United States, supra*, note 1.

and that this case be remanded for further proceedings consistent with the requirements of the Fourth Amendment.

Respectfully submitted,

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BRIEF FOR RESPONDENT

RESTATEMENT OF QUESTION PRESENTED

Did the Trial Court in refusing to hear testimony at a suppression hearing which purportedly would challenge the truth of certain averments of a search warrant affidavit, act contrary to the Fourth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

The question posed is improperly before this Court because of initial fatal defect of first introduction contrary to Delaware procedural rules.

The exclusionary rule should not be applied to this state case since the rule is not integral to the 4th Amendment but merely adjunctive thereto. Stone v. Powell, 428 U.S. 465 (1975). Extension of the rule to state cases infringes on the orderly administration of criminal justice, a predominant state function, with no proven deterrent effect. Federal cases applying the exclusionary rules can be distinguished on the basis of federal rules of criminal procedure different from Delaware. Societal interests far outweighing individual protections are jeopardized by such extension.

Even if rule is extended to this case the proffer of proff was insufficient to trigger a hearing on the suppression request. United States v. Carmichael, 489 F.2d 983 (C.A. 7 1973). No specific allegation of intentional, reckless or negligent misrepresentation on the part of the affiants was advanced to warrant a time consuming, trial prolonging, hearing process.

The evidence recovered in the search warrant and introduced at trial was insignificant to the jury verdict of guilt. It only served to assist establishment of identification which was superfluous in view of positive identification of victim, pretrial admissions of defendant and the latters own testimony. Further, the averments challenged were of marginal value in establishment of probable cause and not essential thereto.

ARGUMENT

I.

THE QUESTION POSED IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW BECAUSE IT WAS INITIALLY STATUTORILY DEFICIENT IN PRESENTATION TO THE TRIAL COURT.

Rule 41 (e) Delaware Superior Court Criminal Rules provide that unless opportunity did not exist or the moving party was not aware of the grounds, a motion to suppress evidence shall state the grounds upon which it is made.[1] The Motion purportedly giving rise to this review is completely devoid of even a remote reference to the veracity of the allegations contained in the search warrant affidavit (App. PPS. 11, 12).

The Procedural Criminal Rules of the Delaware

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1 "(e) Motion for Return of Property and to Suppress Evidence. An application for the return of property and to suppress for use as evidence anything obtained as a result of an unlawful search and seizure shall be made by motion supported by the affidavit of the person on whose behalf the motion is made. The motion shall state the grounds upon which it is made and shall set forth the standing of the moving party to make the application. The motion shall be made before the trial or hearing in which the property seized may be used as evidence, unless opportunity therefor did not exist or the moving party was not aware of the grounds for the motion; but the Court in its discretion may entertain the motion at the trial or hearing. Issues of fact shall be determined by the Court on affidavits or in such other manner as the Court directs."

Superior Court have the force and effect of statute.[2] They are entitled to appropriate weight in the considerations of this Court. Wainwright v. Sykes, 53 L.Ed.2d 594 (1977). Comity and orderly administration of justice require this Court to give proper deference to the mandate of the state court.

Concededly, Delaware raises this issue for the first time in this proceeding. It does so under the doctrine of plain error and requests the Court to take cognizance thereof in that concept. The writ should be dismissed as improvidently granted.

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[2] 11 Del.C. §5121 (a) - "The Superior Court may, from time to time, adopt and promulgate general rules which prescribe and regulate the form and manner of process, pleading, practice and procedure governing criminal proceedings in the Superior Court from their inception to their termination, including such proceedings before inferior courts and justices of the peace as are preliminary to indictment or information filed in the Superior Court."

11 Del. C. §5122 - "Any inconsistency or conflict between any rule of court promulgated under the authority of §5121 of this title, or prior law, and any of the provisions of this Code or other statute of this State, dealing with practice and procedure in criminal actions in the Superior Court, shall be resolved in favor of such rule of court."

II.

THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD NOT BE EXPANDED TO REQUIRE INDIVIDUAL STATES TO ALLOW SUPPRESSION HEARINGS TO DETERMINE THE VERACITY OF THE ALLEGATIONS IN AN AFFIDAVIT SUPPORTING A SEARCH WARRANT CONSTITUTIONALLY VALID ON ITS FACE.

The so-called "exclusionary rule" promulgated in Weeks v. United States, 232 U.S. 383 (1914), and made applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961), is the nexus to the question under consideration. Neither defendant's guilt nor innocence is at stake at this juncture. The sole issue is the admissibility of otherwise competent and relevant evidence. Aquilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), have laid down 4th Amendment guidelines for search warrant affidavits. Compliance therewith adequately fulfills 4th Amendment requirements without further extension of an exclusionary rule to deflect the truth finding function of trial by deletion of reliable evidence. As stated in the unanimous New Jersey Supreme Court opinion in State v. Petrillo, 293 A.2d 649, 653 (1972) cert. den. 410 U.S. 945:

> "In our view the constitutional safeguards are met when the impartial judge finds the affidavit for the warrant credible and legally sufficient. Compliance with the requirement for an oath by the officer must be regarded as a procedurally adequate manifestation of his veracity. That oath followed by the judge's determination that the facts vouched for show

probable cause are all the Constitutions demand and guarantee to our citizens."

The exclusionary rule has been described in United States v. Calandra, 414 U.S. 328, 348 (1974), in language as follows:

> "In sum, the rule is a judically created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

The foregoing language was more recently adopted in United States v. Janis, 428 U.S. 433, 436 (1976). This Court in Calandra, supra, refused to extend the exclusionary rule to Grand Jury proceedings and in Janis, supra, likewise refused extention to civil matters. Stone v. Powell, 428 U.S. 465, 486 (1975), stating that "Post-Mapp decisions have established that the rule is not a personal constitutional right" refused to allow an application for habeas corpus predicated upon a violation of the exclusionary rule. Walder v. United States, 347 U.S. 62 (1954), allowed evidence tainted by the exclusionary rule to be introduced for impeachment purposes. Such ruling lend credence to the proposition that the exclusionary rule is not an integral part of the 4th Amendment but only an adjunctive remedy. This remedy empirically has not been shown to be effective. Powell, supra. Weighing the utility of the exclusionary rule against the costs to rational enforcement of the criminal law requires enumeration of the balancing factors. Application of the rule in this and similar cases would possibly serve to weed out what must be a minimal number of perjurious government agents. Of course the sanction as a remedy would be superimposed on an

already existing severe penalty for perjury.[3] No deterrent effect can be rationalized which would add to the existing deterrence of a perjury charge and conviction. On the other hand criminal trial dockets are increasing daily with the necessity for expenditing trials internally as well as numerically. Of course a 6th Amendment speedy trial right exists in every defendant awaiting disposition. To prolong trials by imposition of exclusionary rule suppression hearings would disastrously tax already overburdened trial calendars jeopardizing 6th Amendment rights to those awaiting trial.

A substantial consideration in Mapp, supra, influencing the imposition of the exclusionary rule upon the states appears to be a lack of an alternative effective remedy suiting the facts involved therein. In this case an entirely adequate remedy, dehors the exclusionary rule, is readily apparent in the form of perjury, contempt of court, or official misconduct prosecutions and/or civil rights actions against the State. In Delaware where the Attorney General prosecutes all crimes without supervisory or disciplinary authority over any of the various police agencies no conflict of interest is possible in prosecutions of offending police officers.

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[3] 11 Del. C. §1221 - "A person is guilty of perjury in the third degree when he swears falsely." (A misdemeanor subject to 2 years imprisonment).

11 Del. C. §1222 - "A person is guilty of perjury in the second degree when he swears falsely and when his false statement is:

(1) Made in a written instrument for which an oath is required by law; and

(2) Made with intent to mislead a public servant in the performance of his official functions; and

(3) Material to the action proceeding, or matter involved."

(E felony subject to 7 years imprisonment)

The benefit of the exclusionary rule's deterrent effect in this case is far outweighed by the societal interests in preserving the integrity of orderly criminal law enforcement.

This Court has previously recognized that the prevention and dealing with crime is much more the business of the states than it is of the Federal Government. Irvine v. California, 374 U.S. 128 (1953), which was followed in Patterson v. New York, 53 L.Ed.2d 281 (1977). Patterson further elaborated that the administration of justice by the individual states in the burden of producing evidence should not be intruded upon by this Court's lightly construing the Constitution. The imposition of the exclusionary rule in the area under review would seriously impede the states orderly administration of justice. The Court should undergo further restraint when considering application of a deterrent remedy not integral to the Constitution.

A substantial number, if not the majority, of states considering the question propounded here in the absence of statute have rejected the pre-trial suppression procedure challenging the truth of the allegations in a search warrant affidavit. State v. Sabario, 514 P.2d 474 (Ariz. 1973); Liberto v. State, 451 S.W.2d 464 (Ark. 1970); People v. Thornton, 327 P.2d 161 (Cal. 1958); People v. Healy, 261 N.E.2d 468, cert. den. 402 U.S. 905 (Ill. 1971); Mattingly v. Commonwealth, 221 S.W2d 82 (Ky. 1949); Caslin v. Commonwealth, 491 S.W.2d 832 (Ky. 1973); State v. Anselmo, 256 So.2d 98 (La. 1971); Tucker v. State, 224 A.2d 111, cert. den. 386 U.S. 1024 (Md. 1966); Wood v. State, 322 So.2d 462 (Miss. 1975); State v. Petillo, 293 A.2d 649 (N.J. 1972), cert. den. 410 U.S. 945; State v. Edwards,

311 P.2d 266 (Okla. 1957); Owens v. State, 399 S.W.2d 507 (Tenn. 1965); Griffey v. State, 327 S.W.2d 585 (Tex. 1959); Annot. 5 ALR.2d 394; Kipperman: Search Warrant Affidavits 84 Harv. L. Rev. 825, 828. This Court should recognize that individual states are confronted with widely varying problems in the local administration of criminal justice which are best resolved by the highest court within each state. Any attack on the decisions of these courts should be considered in this vein as well as with a view of comity, judicial integrity and societal values.

The decision in the Federal Circuit Courts which approve inquiry into the veracity of a search warrant supporting affidavit are distinguishable from Delaware practice. Prior to October 1, 1972, Rule 41 (e) Federal Criminal Rules provided inter alia "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued".[4]

[4] "(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trail. The motion to suppress evidence may also be made in the district where the trail is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Subsequent to October 1, 1972, Rule 41 (e) of the Federal Criminal Rules provides for the return of property to an aggrieved person "on the ground that he is entitled to lawful possession of the property which was illegally seized. The Judge Shall receive evidence on any issue of fact necessary to the decision of the motion."[5] Delaware's Rule 41 has no similar provision.[6] In the latter case reliance is obviously placed in the neutral judicial officer to determine credibility of the affiant as an integral requisite for issuance of the warrant. McCray v. Illinois, 386 U.S. 300, 307 (1967) bolsters this concept in the following language:

---

5 "(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trail. If a motion for return of property is made or comes on for hearing in the district of trail after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

6 "(e) Motion for Return of Property and to Suppress Evidence. An application for the return of property and to suppress for use as evidence anything obtained as a result of an unlawful search and seizure shall be made by motion supported by the affidavit of the person on whose behalf the motion is made. The motion shall state the grounds upon which it is made and shall set forth the standing of the moving party to make the application. The motion shall be made before the trial or hearing in which the property seized may be used as evidence, unless opportunity therefore did not exist or the moving party was not aware of the grounds for the motion; but the Court in its discretion may entertain the motion at the trial or hearing. Issues of fact shall be determined by the Court on affidavits or in such other manner as the Court directs."

> "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding."

Finally the search warrant affidavit is unattainably beyond the reach of insulation from all mis-information. Hearsay, Jones v. U.S., 362 U.S. 257(1960), an unnamed reliable informant, McCray v. Illinois, 386 U.S. 300 (1967),fleeting observations, co-defendants activities, etc., are all incapable of testing for veracity. Since only probable cause is the criteria and neither guilt nor innocence depends on the outcome, these areas are free from truth seeking inquiry without infringement on the 4th Amendment. In this light an affidavit embracing an oath is necessarily on a higher plane of credibility and should be conclusive.

III.

ASSUMING, ARGUENDO, A RIGHT TO A HEARING TO DETERMINE THE VERACITY OF ALLEGATIONS IN A SEARCH WARRANT AFFIDAVIT, THE PRELIMINARY SHOWING WAS INSUFFICIENT TO INITIATE SUCH PROCESS.

The majority, if not all, courts both Federal and State passing upon the threshold question of the right to a hearing on the truthfulness of a search warrant affidavit hold that a substantial showing of misstatement must be demonstrated to trigger the hearing. As stated in United States v. Bolton, 458 F.2d 377, 378 N.6. (9th CA 1972):

> "Nevertheless, existing authority uniformly requires a strong and substantial showing prior to the holding of a hearing upon such question. There is no justification for allowing such a de novo trial of the issuing magistrate's determination as a routine step in every case. United States v. Halsey, 257 F.Supp. 1002 (S.D.N.Y. 1966); United States v. Roth, 28 F. Supp. 364 (S.D.N.Y. 1968); United States v. Gillette, 383 F.2d 843 (2nd Cir. 1967); United States v. Dunning, 425 F.2d 836 (2nd Cr. 1969)."

See also United States v. Rael, 467 F.2d 333 (CA 10 1972); United States v. Carmichael, 489 F.2d 983 (CA7 1973); United States v. Thomas, 489 F.2d 664, 669 (CA 5 1973); United States v. Marchart, 492 F.2d 899 (CA 8 1974); United States v. Thornton, 454 F.2d 957, 966-970 (D.C. Cir. 1971); People v. Alfinito, 16 N.Y.2d, 211 NE.2d 644 (1965); State v. Boyd, 224 NW.2d 609 (Iowa, 1974); State v. Petillo, 293 A.2d 649 (N.J. 1972); O'Bean v. State, 184 So.2d 635 (Miss. 1966); State v. Goodlaw, 523 P.2d 1204 (Wash. 1974).

Defendant's attorney first requested the hearing on the morning of trial stating that he questioned the validity of some of the points made in the affidavit. (App. P. 14). As a proffer of proof he stated "I intend to produce Mr. Wesley Lucas, * * * * , and Mr. James Morrison, * * * *, who I believe will give information that will tend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant." (App. P. 16) (underlining added)

Probable cause is the legal yardstick underlying the initiation of any and all criminal judicial actions.

Searches with or without a warrant, arrests with or without a warrant, informations and indictments, Grand Jury actions, preliminary hearings, extraditions, etc., all embrace that element. It should equally be applicable to a petition to collaterally attack a facially sufficient search warrant affidavit. The proffer here made, supra, falls fatally short of any concept of probable cause or "a strong and substantial showing" (Bolton, supra) that misstatements were contained in the affidavit. To allow a hearing in this case would grant a license to all defendants in search and seizure matters to routinely embark on a general discovery, time consuming process. The impediment to orderly criminal law enforcement is obvious and not to be condoned.

The burden to initiate the hearing with probable cause to warrant a trial court's belief that misstatements exist in the affidavit manifestly belongs on the defendant. The search warrant is facially sufficient and the following presumptions exist:

> (1) The affiants, police officers, properly performed their duties. Wharton's Criminal Evidence, 13th Ed. P. 209; State v. Emory, 193 Kan. 52, 391 P.2d 1013, cert. den. 379 U.S. 906 (1964).
>
> (2) Innocence from the crime of perjury or false statement as to the affiants.
>
> (3) The magistrate, a judicial officer, properly performed his duty.

It is encumbent upon the defendant to offer rebuttal to these presumptions in order to take a demand for a hearing out of the condemned routine procedure. This the defendant failed to accomplish and the trial court was eminently correct in denial of a hearing.

An additional flaw in the so called offer of proof

with relation to the alleged inaccuracy of the information in paragraph 17 of the affidavit (App. P. 8) was demonstrated at trial in the following cross-examination of defense witness Lucas:

> "O. Mr. Lucas, isn't it true that Mr. Franks frequently wore a thermal undershirt and a brown jacket and a dark green knit hat?
>
> A. Yes, I have seen him wear that." (App.P. 36)

The record is devoid of testimony of any other witness on the veracity of the affidavit allegations. Thus, the only demonstrable point of defense counsel's speculative offer of proof clearly demonstrates fundamental error which, it is submitted, is presumptive of the balance of the offer.

IV.

ASSUMING ARGUENDO THAT THE AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT MAY BE TESTED FOR THE VERACITY OF THE ALLEGATIONS CONTAINED THEREIN AT A PRE-TRIAL SUPPRESSION HEARING THE ERROR IN THE CASE AT BAR WOULD HAVE BEEN HARMLESS.

The record discloses that the evidence sought to be suppressed amounted to the following items: a thermal undershirt, black pants with a belt, brown 3/4 length coat, a thermal knit cap and a knife (App. PPS 30, 31, 32). The opening statement of defense counsel left no

doubt but what the defense was to be voluntary consent to the charges of Rape, Kidnapping and Burglary 1st Degree (Excerpt defendant's opening statement P.2). The defendant in his pre-trial admissions admitted his identification as the person involved in the alleged charges. (Record PPS 217, 218, 220, 221) The victim positively identified the defendant at trial (App. P. 28). Further, the defendant admitted his identification in his direct testimony (App. P. 37). Thus, the introduction of items of defendants clothing answering the victims description was rendered completely harmless as a mere substantiation of an established fact.

One item other than identification items of clothing sought to be suppressed consisted of a knife (App. 32). The knife merely served the purpose of transposing the victims verbal description into a generic example of what she was attempting to convey. Her identification of the knife was couched in the following words:

> "I did not see the knife in the light, but I did feel of it and it had, as I told the Police, it had one smooth edge and one sharp edge and it appears to be the same length as what I described." (Record P. 69)

On cross-examination relative to the knife, the victim stated that she saw the knife only in pitch darkness to the extent of its outline and a dark rather than light handle. (Record P. 105) Subsequently she stated she could not be positive of the knife's identification except that it had a flat edge and a sharp edge and it conformed to the description she had given the police. (Record PPS. 114, 115)

The jury at this point is fully aware of the significance of the knife in evidence as merely exemplary of the generic class of weapon testimonially described

by the victim. Any similar knife whether obtained by a search or furnished from any kitchen would have had the same significance as far as jury consideration was concerned.

There is no reasonable possibility that the evidence complained of might have contributed to the conviction and error, if any, was harmless. Chapman v. California, 386 U.S. 18 (1967).

The two leading Federal cases on the issue of admissibility of evidence allegedly seized in violation of the exclusionary rules are United States v. Carmichael, 489 F.2d 983 (C.A. 7 1973) and United States v. Thomas, 489 F.2d 664 (C.A. 5 1973). The other Circuit Courts ruling on the subject have adopted one or the other or a combination of these cases: U.S. v. Belculfine, 508 F.2d 58 (74); U.S. v. Gonzalez, 488 F_2 833 (73); U.S. v. Vento, 533 F.2d 838 (76); U.S. v. Lee, 540 F_2 1205 (76); U.S. v. Thomas, 489 F_2 664; U.S. v. Luna, 525 F_2 4 (75); U.S. v. Carmichael, 489 F_2 983 (73); U.S. v. Marihart, 492 F_2 897 (74); U.S. v. Bolton, 458 F.2d 377 (72); and U.S. v. Harwood, 470 F.2d 322 (72). Carmichael, supra, holds evidence inadmissable if (1) There is a deliberate inclusion of a false statement or (2) a reckless inclusion of a false statement essential to the finding of probable cause. Thomas, supra, adds a further refinement of any unintentional false statement material to probable cause. The proffer or proof in the instant case is incapable of determination as to whether the misstatements thought to be present were intentional, reckless or negligent on the part of the affiants. One face is abundantly clear however. The attack centers on allegations non-essential to the establishment of probable cause.

The affidavit excised of the offensive paragraphs 15, 16, and 17 still contains factually (1) a rape occurred at a place a very short distance and within sight of where defendant lives (2) that 6 days previous to the rape he had sexually assaulted another female, Brenda Bradley, at his residence (3) that he knew of Cynthia Bailey (victim) and her sexual charge later on the same day it occurred (4) that the victim's description of the rape perpetrator matched the description of the defendant (5) that the defendant had a criminal record involving rape. (App. PPS. 7, 8)

A reading of the affidavit in the common sense manner dictated in United States v. Ventresca, 380 U.S. 102 (1965), leaves no doubt but that probable cause to issue the warrant amply survives the elimination of the questioned allegations. Without a specific initial showing of intentional misrepresentation (lack in this case) the alleged affidavit frailties become harmless error beyond a reasonable doubt. Chapman v. California, supra. Thus, the improvidence of granting this writ of certiorari is further demonstrated.

CONCLUSION

The exclusionary rule should not apply in this case and the judgment of the Supreme Court of Delaware should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

THE QUESTION POSED IS PROPERLY BEFORE THIS COURT.

The State of Delaware, for the first time in the brief for Respondent, alleged that the question presently before this court should not be considered because of an alleged deficiency in the motion presented to the Trial Court. Specifically, the Respondent suggested that the Motion to Suppress Evidence and Request

for Hearing did not state sufficiently the grounds upon which it was made.

A. The issue presented by the Respondent is not fairly contained within the question for which Certiorari was granted.

Rule 40(2) of this Court requires that the briefs not raise questions other than those set forth in the Petition for Certiorari. The question before this Court concerns the Trial Court's refusal to admit testimony at the Suppression Hearing and not the propriety of the Trial Court's granting the original motion for such a hearing. The two questions are separate and distinct, the first involving a fundamental question under the United States Constitution and the second involving the administration of Delaware Trial Courts. It is submitted that this Court's Rules and long standing decisions[1] dictate that the Court's consideration be confined to the question for which Certiorari was granted.

B. The action on the part of the Trial Court was fully within the broad discretion afforded by Delaware Statute and the rules of the Superior Court of the State of Delaware since the Respondent was not prejudiced by the ruling.

In the matter raised by the Respondent, the Trial Judge can and should exercise wide discretion, guided by applicable statutes and Court rules. Examination of such statutes and rules indicates that the Trial Court satisfied the letter and spirit of both.

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[1]Johnson v. Manhattan Ry. Co., 53 S. Ct. 721, 727; 289 U.S. 479 (1933).
Republic of France v. French Overseas Corporation, N.Y. 48 S. Ct. 516, 517; 277 U.S. 323 (1928).
United States v. Biwabik Mining Co., 38 S. Ct. 462, 464; 247 U.S. 116 (1918).

Consistent with Delaware law and practice, procedural irregularities should be disregarded unless they substantially prejudice the rights of the party affected. Criminal Rule 52(a) of the Superior Court of the State of Delaware provides for Harmless Error as follows:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Thus, it has been held that harmless error, even though involving constitutional rights, do not require reversal of a conviction[2] and that where the admission of immaterial testimony worked no injury to the plaintiff in error and he was not prejudiced thereby, court will refuse to reverse the judgment of the court below.[3] Moreover, the statute which provides the basis for the Superior Court rules cited by the Respondent provides

> ". . . the provisions herein must be construed according to the fair import of their terms to promote justice and effect the purpose of the law, as stated in §201 of this Criminal Code."[4]

The interpretation urged by the Respondent would be contrary to the specified principles of construction cited above, in that the result would not promote justice and effect the purposes of the law. Both parties at trial as well as the Court were well informed as to the evidence that the Defendant sought to present, since the matter was discussed prior to the hearing [A-14]. Moreover, the argument of this issue at the Suppression Hearing did not find the State of Delaware surprised or unprepared, since the State presented extensive arguments and citations in support of its position [A-17-21]. The Trial Court's hearing of this question was therefore appropriate and not prejudicial to either party.

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[2]Washam v. State, 235 A.2d 279 (Delaware Supreme Court 1967).

[3]Fisher v. State, 41 A. 184 (1898).

[4]11 Delaware Code, §203.

C. Any deficiencies in the original motion for a Suppression Hearing were previously waived.

The Respondent urges that this issue is now raised under the doctrine of plain error. However, the many opportunities that have passed to raise this objection bear testimony against the issue being plain error. The Respondent failed to object to the alleged deficiency at the Suppression Hearing itself, or on appeal to the Delaware Supreme Court, or in reply to the Petition for Writ of Certiorari. The Respondent's total conduct to date is indicative of a waiver of any objection, and no extraordinary prejudice has been shown to justify any exception to the rule that an issue is not preserved for appeal in the absence of timely objection.

Further, as noted at page 4 of the Respondent's brief, a fundamental purpose for the Superior Court Rules cited by the Respondent is the orderly administration of justice. It is submitted that it would be more disruptive to the administration of justice in the State of Delaware for this court to reverse a discretionary ruling by the Trial Court involving no constitutional question but only local procedure.

II.

A DETERRENT EFFECT AGAINST FOURTH AMENDMENT VIOLATIONS WILL BE PROVIDED ONLY BY EXCLUSION OF WILLFUL, RECKLESS AND NEGLIGENT MISSTATEMENTS IN A SEARCH WARRANT APPLICATION.

The Petitioner concurs with the amicus United States in its conclusion that "the knowing or voluntary nature of [a] misrepresentation gives rise to a strong need for deterrence

and . . . promises that the suppression of evidence will tend to have the desired effect of preventing future transgressions."[5] And that "unless this sanction were available, there would be little to discourage unscrupulous police officers from apending untrue allegations to an affidavit in any close case in an effort to sway a hesitant magistrate."[6]

The Petitioner submits the same considerations apply to any untrue statements included in an affidavit which, by reasonable inquiry, would have been shown to be erroneous. The amicus United States adopted the position of the 7th Circuit in United States v. Carmichael[7] in suggesting that the line between innocence and negligence would be difficult to draw and that recklessly made misstatements should result in exclusion of the resulting evidence while negligently made misstatements should not require exclusion. However, even Carmichael acknowledged that negligent misstatements should and theoretically could be deterred,[8] and it is submitted that the distinction between reckless and negligent behavior seems at least as difficult an inquiry, the definitions of one term often including the other. Thus, recklessness has been defined as heedlessness, carelessness or negligence,[9] and negligent has been considered equivalent to reckless.[10]

In the definitions found in the Delaware Criminal Code, "Recklessly" is said to involve knowledge of and disregard for a

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[5]Brief for United States as Amicus Curiae, page 25.

[6]*Ibid.*, page 26.

[7]49 F.2d 983.

[8]*Ibid.*, at 989.

[9]LaMarre v. Cleveland, C., C. & St. L. Ry. Co., 217 Ill. App. 296, 304.

[10]Stout v. Gallemore, 26 P.2d 573, 577 (1933).

risk[11], while "Criminal negligence" involves a failure to perceive.[12] Significantly, however, both definitions require that the conduct "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

The word negligent is often used to include all conduct which is in reckless disregard of a legally protected interest of others.[13] In the carefully considered writings of Kipperman on the present subject, the word negligent was used in this generic sense, the author recommending the exclusion of all evidence obtained on the basis of allegations that were false, material and negligently made.[14] This is consistent with the concept that both negligence and recklessness involve a degree of culpability which is both preventable and deterrable.

Still another legal scholar, in pointing out that the line between innocence and negligence is more clear than between negligence and recklessness, pointed out that the line between innocence and negligence is one that is commonly drawn:

[11]Delaware Criminal Code, §231(3):

> "Recklessly." A person acts recklessly with respect to an element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

[12]Delaware Criminal Code, §231(4):

> "Criminal negligence." A person acts with criminal negligence with respect to an element of an offense when he fails to perceive a risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

[13]Universal Concrete Pipe Co. v. Bassett, 200 N.E. 843, 847 (1936).

[14]Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harvard Law Review 825 (1971).

> "In thousands upon thousands of lawsuits yearly, juries determine the innocence or negligence of drivers, doctors, government executives, and even law enforcement officers. If it is workable for lay jurors to determine whether a police officer used unreasonable force, surely it is workable for a judge to determine whether an officer was negligent in acquiring or transmitting the information used to invade someone's privacy."[15]

Professor Herman concludes,

> "In our society, government intrusion is a necessary evil - an exception to the right to privacy. As an exception, it must be kept within narrow bounds to protect innocent privacy. That we tolerate non-negligent [innocent] mistakes is already a compromise. To tolerate negligent (and, perhaps, grossly negligent) errors would, in the words of Brinegar, 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' "[16]

The line between negligence and recklessness is, at best, indistinct, and both types of behavior are deplorable and deterrable with respect to false allegations made to obtain a search warrant.

Accordingly, it is respectfully submitted that, for the exclusionary rule to have the desired deterrent effect, all non-innocent material misstatements in a Search Warrant Affidavit should result in the exclusion of evidence obtained pursuant to the warrant.

[15]Herman, Warrants for arrest or search: Impeaching the Allegations of a Facially Sufficient Affidavit, 36 Ohio State Law Journal 721, 750 (1975).

[16]*Ibid.*

III.

THE PRESENT CASE REQUIRES DETERMINATION OF WHETHER RECKLESS, NEGLIGENT OR INNOCENT REPRESENTATIONS REQUIRE EXCLUSION OF THE RESULTING EVIDENCE.

> The amicus American Civil Liberties Union has suggested,
>
> "Because the defendant offered to prove that the police affidavit contained deliberate, intentional, and material misrepresentations, the Court need not decide the Fourth Amendment implications of innocent, negligent, or even reckless misstatements."[17]

While trial counsel did, in fact, intend to produce testimony that would show willful misrepresentations in the Search Warrant Affidavit, the fact remains that neither the testimony itself nor affidavits summarizing the testimony were introduced into the record. Accordingly, this Court's judgment and guidance regarding the full possible spectrum of misstatements, ranging from innocent to willful, is needed for satisfactory resolution of the case, depending on the precise nature of any testimony subsequently introduced.

[17]Brief Amicus Curiae, American Civil Liberties Union Foundation, pages 9-11.

IV.

A REQUIREMENT FOR A PRELIMINARY SHOWING BEFORE A SUPPRESSION HEARING WOULD BE INCONSISTENT WITH ESTABLISHED JUDICIAL PROCEDURE WITH RESPECT TO FOURTH AMENDMENT RIGHTS.

The Respondent[18] as well as the amicus United States[19] have urged that a defendant be required to demonstrate a substantial showing of misstatements before a hearing is granted to show misstatements in a search warrant affidavit. As noted in the Petitioner's opening brief,[20] such a requirement would impose an unreasonable burden on a defendant. Moreover, requiring such a preliminary showing would be inconsistent with the procedure in the enforcement of Fourth Amendment rights regarding searches based on a warrant that is considered insufficient as well as warrantless searches. With challenges to either of the above types of searches, argument or evidence is routinely heard at a suppression hearing. No justification can be seen for requiring extensive preliminary showings in the case of allegations of a false affidavit supporting a search warrant.

One of the more detailed discussions of this matter appears in United States v. Halsey.[21] There, the Court bases a requirement for preliminary showing first on a presumption of truthfulness of the original affiant,[22] usually the police officer, and secondly on the deference that the magistrate's independent assessment of the affidavit should be given.[23] While the complete truthfulness of

[18]Brief for Respondent, pages 11-14.

[19]Brief for the United States as Amicus Curiae, pages 30-33.

[20]Pages 12-14.

[21]357 F. Supp. 1002 (1966).

[22]*Ibid.* at page 1005.

[23]*Ibid.* at page 1006.

police officers and the careful examination of search warrant applications by magistrates are goals devoutly to be wished, their attainment will certainly be expedited by assurance that review of both can easily be had in the routine course of the criminal procedure. Especially in view of the *ex parte* nature of the search warrant hearing and the absence of criminal discovery, a full evidentiary hearing should be available without a cumbersome additional judicial step of a preliminary showing.

Moreover, any requirement for a preliminary showing is likely to become as *pro forma* as search warrant applications themselves, as shown by the offer of proof held sufficient as a preliminary showing in Carmichael:

> "If the witness were allowed to answer my questions with respect to the reliable information, his answers would show that no information had been given at any previous time that led to the arrest or conviction of anybody; that he had prior criminal arrests and criminal convictions, and that there was no basis for his concluding or for this court to conclude that the allegedly reliable informant was a reliable informant."[24]

According, as set forth in the Rules of Criminal Procedure promulgated by this Court, upon motion duly made for return of property or suppression of evidence, the judge should receive evidence on any issue of fact necessary to the decision of the motion[25] without requirement for an extensive preliminary showing before such evidence is given.

In view of the above arguments, taken in conjunction with Petitioner's earlier brief and those of the two amicus curiae, the decision of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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[24] *Supra*, note 7, at page 987.

[25] Rule 41(e).

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No. 77-5176

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROME FRANKS, PETITIONER

v.

STATE OF DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS, PETITIONER

v.

STATE OF DELAWARE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the following question:

Whether the trial court erred in denying, without an evidentiary hearing, petitioner's motion to suppress evidence seized pursuant to a search warrant issued on the basis of a facially valid, but allegedly inaccurate, affidavit.

INTEREST OF THE UNITED STATES

This case presents an important question concerning the proper scope of the Fourth Amendment ex-

clusionary rule. A substantial number of federal criminal cases involve the use of evidence seized during a search conducted on the authority of a search warrant issued upon an affidavit that, on its face, establishes probable cause. On those occasions when defendants have moved to suppress the evidence on the ground that the affidavit contained misstatements of fact, the federal courts of appeals have expressed divergent views on the availability of relief. Accordingly, the United States has a direct and significant interest in the determination whether the court below erred in concluding that a defendant may not attack the accuracy of the representations in a search warrant affidavit and, if so, what procedural and substantive requirements must be satisfied before an evidentiary hearing must be held or evidence suppressed.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the Superior Court of the State of Delaware (Kent County), petitioner was convicted of rape, kidnaping, and burglary, in violation of 11 Del. Code Ann. 764, 783, and 826 (1975 and 1976 Cum. Supp.) The Supreme Court of Delaware affirmed (A. 38–40; 373 A. 2d 578).

1. In the early morning of March 5, 1976, Cynthia Bailey was sexually assaulted in her home in Dover, Delaware (Tr. 47–55). Later the same day, petitioner was arrested by Dover police in connection with another rape charge, this one involving a 15-year old girl named Brenda Bradley. Following his arrest, petitioner remarked to Cpl. Robert McClements that he assumed the charge against him concerned Bailey rather than Bradley (Tr. 175, 186).

Four days later, after further investigation, police officers obtained a warrant authorizing a search of petitioner's apartment for "a white knit thermal undershirt; a brown 3/4 length leather jacket with a tiebelt; a pair of black men's pants; a dark colored knit hat; [and] a long thin bladed knife or other instruments or items relating to the" alleged assault upon Bailey (A. 9). In the affidavit submitted in support of the warrant (A. 6–8), Det. Ronald Brooks and Det. Larry Gray related the circumstances surrounding the Bradley rape and petitioner's statement at the time of his arrest for that crime on March 5 and averred that, on the same day, Cynthia Bailey reported that she had been raped by a black male, approximately 5 feet 7 inches in height and weighing 150 pounds, wearing a white thermal undershirt, black pants, a belt having a silver or gold buckle, a brown leather 3/4 length coat with a tie belt in the front,

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and a dark knit cap pulled around the eyes. The affiants further represented that petitioner matched Bailey's physical description of her attacker, that official records showed that petitioner had previously been convicted of assault with intent to rape, that petitioner lived only a short distance from Bailey's home, that James Williams of the Delaware Youth Center, where petitioner was employed, had revealed that petitioner's "normal dress" consisted of a white knit thermal undershirt and a brown leather jacket, and that Wesley Lucas, also of the Youth Center, had stated that petitioner often wore a dark green knit hat.

In the ensuing search of petitioner's apartment, the police seized several articles of clothing and a knife. Prior to trial, petitioner moved to suppress the evidence taken from his apartment on grounds that "[t]he search warrant used was legally insufficient in that it did not show sufficient probable cause" and that "[t]he affidavit portion of the search warrant is merely conclusory" (A. 11). At oral argument on the motion, however, petitioner expanded his contentions, alleging for the first time that the affidavit contained several false material misstatements of fact and requesting an evidentiary hearing at which the truthfulness of the police officers' representations to the magistrate could be explored. Petitioner also asserted that, if given the opportunity, he would produce Wesley Lucas of the Delaware Youth Center and James

Morrison,[1] formerly of the Youth Center, who would testify (A. 16)

> that neither one of them to the best of their knowledge gave this information to either of the affiants contained in this affidavit, and additionally that the information that they did give was somewhat different than contained in the affidavit and was not to an officer who even swore out the affidavit and that what was stated in there is not an accurate representation of precisely what they said.

No affidavits of Lucas or Morrison or any other evidentiary materials were submitted in support of petitioner's claim. The trial judge rejected petitioner's request for an evidentiary hearing, accepting the State's argument that, in ruling upon the adequacy of the showing of probable cause for a search warrant, the court could not look beyond the "four corners" of the affidavit (A. 24). It then denied the suppression motion (A. 25).

At trial, Bailey identified petitioner as her assailant and denied that she had consented to engage in sexual activities with him (A. 28–29). In addition, over petitioner's objection, the State introduced into evidence various articles of clothing (A. 29–31) and the knife (A. 31–32) that had been obtained during the search of petitioner's apartment. Petitioner took the witness stand and admitted that he had had sexual intercourse with Bailey on the morning of March 5, 1976, but

[1] The record is unclear whether the intended witness referred to by petitioner as "James Morrison" is the same person as the "James Williams" whose statements were relied upon in the search warrant affidavit.

he contended that she had voluntarily submitted to his advances (A. 37).

2. The Supreme Court of Delaware affirmed petitioner's convictions (A. 38–40), rejecting petitioner's claim that the trial judge had improperly denied his request for an evidentiary hearing to determine the truthfulness of the statements presented in the search warrant affidavit. Although the court below acknowledged that the question whether the veracity of a facially-valid search warrant affidavit could be challenged on a motion to suppress was an unsettled one, it sided with what it viewed as "the majority rule" in holding that such attacks were impermissible. The court explained (A. 40):

> First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by [petitioner] are more properly considered in a trial on the merits.

SUMMARY OF ARGUMENT

I. Although this Court "has never passed directly" (*Rugendorf* v. *United States,* 376 U.S. 528, 531–532) on the extent to which a facially valid search warrant affidavit may be attacked on the ground that it contains misstatements of fact, the federal courts of appeals have uniformly concluded that there are circum-

stances in which at least a limited inquiry into the accuracy of the representations must be allowed. We agree with these decisions that a magistrate's determination of the veracity of the factual showing for a search warrant cannot be conclusive.

The Warrant Clause of the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation * * *," and this Court has defined probable cause as "facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information * * * sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162. These important requirements would mean very little if police officers could deceive a magistrate into issuing a warrant on the strength of false representations and could thus insulate their lack of probable cause from subsequent judicial review.

None of the reasons advanced to prohibit such challenges is persuasive. A magistrate's determination of the *sufficiency* of a search warrant affidavit, while entitled to deference by trial and appellate judges, nonetheless may be attacked on a motion to suppress, and there is no reason to assume that allowance of a similar pre-trial challenge to the *truthfulness* of the affidavit would tend to deprecate the magistrate's crucial function or would have an adverse effect upon magistrates' dedication, diligence, or morale. More-

over, while such challenges might on occasion increase the duration of pre-trial proceedings, the notion that every allegation of a misrepresentation in a search warrant affidavit would lead inevitably to a protracted evidentiary hearing is illusory. Trial judges have a variety of tools to dispose summarily of insubstantial claims. Indeed, there is no proof that the numerous jurisdictions that have recognized a defendant's right to impeach a facially-sufficient search warrant affidavit have experienced a wave of lengthy suppression hearings.

II. Although a defendant may not be precluded entirely from attacking the accuracy of the representations in a search warrant affidavit, it does not follow that the right to a hearing is automatic and unlimited. As with any contention that relevant, incriminating evidence must be suppressed because of a Fourth Amendment defect in the procedures that led to its seizure, the contours of a defendant's right must be analyzed in terms of the policies underlying the exclusionary rule.

A. Despite its broad deterrent purpose, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra,* 414 U.S. 338, 348. Determination of the exclusionary rule's usefulness in the context of misstatements in a search

warrant affidavit thus requires a balancing of the incremental deterrent value of suppression against the wisdom of applying a rule that "deflects the truth-finding process and often frees the guilty." *Stone* v. *Powell,* 428 U.S. 465, 490. This in turn demands a pragmatic assessment of the culpability of the police in presenting the false statement to the magistrate and the magnitude of the harm caused by the official misconduct to the privacy rights of the subject of the search.

B. Suppression is most appropriate when law enforcement agents have engaged in intentional misconduct. In such instances the knowing and voluntary nature of their action gives rise to a strong need for deterrence and creates a realistic expectation that the suppression of evidence will have the desired effect of preventing future transgressions. So convincing is the argument in favor of suppression in cases of intentional misstatements that the exclusionary rule should be applied whenever the falsified information is likely to have influenced the magistrate's decision to issue the warrant, whether or not it was essential to the establishment of probable cause.

On the other hand, suppression of evidence attributable to wholly innocent misrepresentations, even material ones, would advance none of the interests protected by the exclusionary rule. Indeed, if the police officer had a well-founded, objective belief in the truthfulness of the facts he relayed to the magistrate, the Fourth Amendment would not have been offended even if those facts were erroneous.

The most difficult exclusionary rule problems are presented by affidavits containing factual misstatements whose falsity, while not known to the affiant, could have been ascertained through the exercise of due care. We believe that the wisest accommodation between the legitimate desire to deter unacceptable police practices and the "other values vital to a rational system of criminal justice" (*Stone* v. *Powell, supra,* 428 U.S. at 494) is achieved by concluding, as have the majority of federal courts of appeals, that an unintentional material misrepresentation voids the search warrant if made recklessly, but not if made merely negligently.

III. A defendant obviously need not be accorded an evidentiary hearing if his claim of a misstatement in a search warrant affidavit, accepted as true, would not entitle him to relief under the standards we have outlined above. Even if a suppression motion states a claim for relief, however, the trial judge should not be obliged to grant an evidentiary hearing unless the defendant (a) indicates with specificity the portions of the affidavit alleged to be false, (b) characterizes the government's responsibility for the misrepresentation, and (c) substantiates his assertions with affidavits or other sworn statements from his intended witnesses. These reasonable requirements would avoid unnecessary and time-consuming "fishing expeditions," sought either with the dim hope of eliciting statements that would contradict the affidavit or to produce useful discovery for trial, but would not unduly burden defendants who entertain a good faith belief that an affidavit is inaccurate.

IV. The courts below denied petitioner's request for an evidentiary hearing on his suppression motion in the erroneous belief that it was never permissible to conduct an inquiry into the accuracy of the representations in a search warrant affidavit. There has therefore been no consideration of the precise nature of petitioner's claims or of the adequacy of his pretrial showing of falsity. In these circumstances, it would be appropriate to remand this case with instructions to assess petitioner's motion to suppress in light of the correct substantive and procedural standards.

ARGUMENT

I. SOUND ADMINISTRATION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE REQUIRES THAT A DEFENDANT BE PERMITTED TO CHALLENGE THE ACCURACY OF THE REPRESENTATIONS IN A FACIALLY VALID SEARCH WARRANT AFFIDAVIT ON A MOTION TO SUPPRESS EVIDENCE

This Court "has never passed directly" on the extent to which a facially valid search warrant may be attacked on a motion to suppress evidence on the ground that the underlying affidavit, although apparently establishing probable cause for issuance of the warrant, contained misstatements of fact. See *Rugendorf* v. *United States*, 376 U.S. 528, 531–532; *North Carolina* v. *Wrenn,* 417 U.S. 973, 973–976 (White, J., dissenting from the denial of certiorari).

In large part this is attributable to the fact that, until recently, both state [2] and federal [3] courts had been in general agreement that such attacks were impermissible.

Every federal court of appeals that has confronted the issue in the past few years, however, has held otherwise. Although articulating slightly different standards governing the kinds of allegations that must be made in a suppression motion to entitle a defendant to an evidentiary hearing or the type of showing that must be made at the hearing to entitle a defendant to relief, these courts have recognized that

[2] Indeed, this is still the rule in almost half of the states that have considered the question. See, *e.g.*, *Powell* v. *State*, 540 S.W. 2d 1 (Ark. Sup. Ct.); *State* v. *Williams*, 169 Conn. 322, 363 A. 2d 72; *People* v. *Stansberry*, 47 Ill. 2d 541, 268 N.E. 2d 431, certiorari denied, 404 U.S. 873; *State* v. *Sanders*, 222 Kan. 189, 563 P. 2d 461, certiorari denied, October 3, 1977, No. 76–1793; *Caslin* v. *Commonwealth*, 491 S.W. 2d 832 (Ky. Ct. App.); *Wood* v. *State*, 322 So. 2d 462 (Miss. Sup. Ct.); *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111, certiorari denied, 386 U.S. 1024; *State* v. *Brugioni*, 320 Mo. 202, 7 S.W. 2d 262; *State* v. *Petillo*, 61 N.J. 165, 293 A. 2d 649, certiorari denied, 410 U.S. 945; *Brown* v. *State*, 565 P. 2d 697 (Okla. Crim. App.); *State* v. *Seymour*, 46 R.I. 257, 126 Atl. 755, partially overruled on other grounds, *State* v. *LeBlanc*, 100 R.I. 523, 217 A. 2d 471; *Owens* v. *State*, 217 Tenn. 544, 399 S.W. 2d 507; *Oubre* v. *State*, 542 S.W. 2d 875 (Tex. Crim. App.). See generally Comment, *Challenges to the Veracity of Facially Sufficient Warrants—Is the Truth Irrelevant?*, 7 Seton Hall L. Rev. 827, 843–844 (1976) (collecting cases).

[3] See, *e.g.*, *Kenney* v. *United States*, 157 F. 2d 442 (C.A. D.C.); *Gracie* v. *United States*, 15 F. 2d 644 (C.A. 1), certiorari denied, 273 U.S. 748; *United States* v. *Brunett*, 53 F. 2d 219 (W.D. Mo.). See also *United States* v. *Bowling*, 351 F. 2d 236, 242 n. 2 (C.A. 6), certiorari denied, 383 U.S. 908.

at least a limited examination of the accuracy of the representations in a search warrant affidavit is appropriate. See, *e.g.*, *United States* v. *Belculfine*, 508 F. 2d 58 (C.A. 1); *United States* v. *Pond*, 523 F. 2d 210 (C.A. 2), certiorari denied, 423 U.S. 1058; *United States* v. *Armocida*, 515 F. 2d 29 (C.A. 3), certiorari denied *sub nom. Gonzal* v. *United States*, 423 U.S. 858; *United States* v. *Lee*, 540 F. 2d 1205 (C.A. 4), certiorari denied, 429 U.S. 894; *United States* v. *Thomas*, 489 F. 2d 664 (C.A. 5), certiorari denied, 423 U.S. 844; *United States* v. *Luna*, 525 F. 2d 4 (C.A. 6), certiorari denied, 424 U.S. 965; *United States* v. *Carmichael*, 489 F. 2d 983 (C.A. 7) (*en banc*); *United States* v. *Marihart*, 492 F. 2d 897 (C.A. 8), certiorari denied, 419 U.S. 827; *United States* v. *Taxe*, 540 F. 2d 961 (C.A. 9), certiorari denied, 429 U.S. 1040; *United States* v. *Harwood*, 470 F. 2d 322 (C.A. 10).[4]

We agree with these decisions that the proper administration of the exclusionary rule demands some inquiry into the truth of the factual basis for a search warrant affidavit. The Warrant Clause of the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation * * *," and this Court has defined probable

[4] See also American Law Institute, *A Model Code of Pre-Arraignment Procedure* § SS290.3(1)(a) (1975): "[I]n any proceeding on a motion to suppress evidence seized by authority of a search warrant, or incidental to an arrest made by authority of an arrest warrant, the moving party shall be entitled to contest, by cross-examination or offering evidence, the good faith of any testimony presented to the issuing authority and relied on to establish reasonable cause for issuance of the warrant."

cause as "facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information * * * sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed or that evidence of a crime will be found in the area to be searched. *Carroll* v. *United States,* 267 U.S. 132, 162. These important requirements, which are designed to "prevent[] the issue of warrants on loose, vague or doubtful bases of fact" (*Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 357), would be "reduce[d] * * * to a form of words" (*Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392) if police officers could deceive a magistrate into issuing a search warrant on the strength of false representations and could thus insulate their lack of probable cause from subsequent judicial review. To ensure compliance with constitutional standards, an officer who makes a warrantless search (*e.g.,* because of exigent circumstances) is routinely obliged to defend the accuracy as well as the sufficiency of his assessment of probable cause at an adversary suppression hearing. *Terry* v. *Ohio,* 392 U.S. 1, 21–22. There is little reason to relieve the officer of a substantial part of this obligation by foregoing entirely any post-search scrutiny of the truthfulness of his factual assertions simply because the probable cause determination may have been submitted *ex parte* to a judicial officer in advance. On the contrary, it would appear that the deterrent objectives of the exclu-

sionary rule would be well served by allowing such challenges in appropriate circumstances.[5]

Moreover, none of the rationales that have been advanced in decisions prohibiting challenges to the accuracy of a search warrant affidavit is persuasive.

1. The argument most frequently presented is that the privacy interests protected by the Fourth Amendment are substantially satisfied by requiring the magistrate to consider the affiant's credibility carefully before issuing the search warrant[6] and would not be aided significantly by a second inquiry into the subject after the search has occurred. See, *e.g., State* v.

[5] Although not relevant to a defendant's entitlement to an evidentiary hearing on his suppression motion, the fact that a warrant was obtained by the police officer may be extremely significant in the ultimate determination whether the evidence uncovered as a result of the search should be suppressed. In the government's petition for a writ of certiorari in *United States* v. *Karathanos*, No. 75–1402, certiorari denied, 428 U.S. 910, we argued that a distinction should be drawn for exclusionary rule purposes between searches with and without warrants and that the rule should not be applied to bar the admission of evidence, obtained in good faith by federal law enforcement officers executing a facially valid search warrant issued by a federal magistrate, because the warrant was ultimately held to have been erroneously issued. The petition recognized an exception, however, for warrants "procured in bad faith or on the basis of material misrepresentations" (Pet. 11–12).

[6] Magistrates are equipped with authority to accomplish this task. Rule 41(c), Fed. R. Crim. P., for example, provides that "[b]efore ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce * * *." See also 11 Del. Code Ann. 2301 *et seq.* (1975).

Anselmo, 260 La. 306, 256 So. 2d 98, 101, certiorari denied, 407 U.S. 911; *People* v. *Bak,* 45 Ill. 2d 140, 144–146, 258 N.E. 2d 341, 343–344, certiorari denied, 400 U.S. 882. As Chief Justice Weintraub put the matter in *State* v. *Burnett,* 42 N.J. 377, 388, 201 A. 2d 39, 45, in a passage quoted with approval in *McCray* v. *Illinois,* 386 U.S. 300, 307, "[w]here the issue of probable cause is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an *ex parte* proceeding." Once that process has occurred, these courts have reasoned, re-examination of the credibility question on a motion to suppress would tend to deprecate the importance of the magistrate's crucial function and "would make the issuance of a warrant more mechanical and less a solemn judicial act * * *." Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppres ng Evidence,* 84 Harv. L. Rev. 825, 830 (1971).[7]

2. Other courts have contended, with some justification, that a rule sanctioning challenges to a search warrant based upon the falsity of the underlying affidavit would necessarily precipitate a number of time

[7] As Judge Frankel observed in *United States* v. *Halsey,* 257 F. Supp. 1002, 1005 (S.D. N.Y.): "To begin at the beginning, when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing. And so, if there were nothing more to consider, it would follow that the veracity of a supporting affidavit could always be tried on a motion to suppress. But there are other, ultimately decisive things to consider. One is the question of appropriately dividing power and responsibility between the magistrate issuing a warrant and a judge later considering its legality."

consuming "mini-trials," often requiring the resolution of difficult questions concerning a witness's veracity. In light of what these courts have considered to be "the speculative risk of a rare warrant issued on a false statement" (*State* v. *Petillo,* 61 N.J. 165, 178, 293 A. 2d 649, 655, certiorari denied, 410 U.S. 945), and the availability of an "indictment for perjury or false swearing, a charge of criminal contempt, and assessment of monetary damages in a civil action" against the occasional mendacious affiant (*id.* at 174, 293 A. 2d at 653–654), such mini-trials have not been thought to be worth the cost of taxing further an already overburdened judicial system and of "frustrat[ing] the public's interest in the fast and expeditious administration of criminal laws." *United States* v. *Dionisio,* 410 U.S. 1, 17. See, *e.g., State* v. *Anonymous,* 30 Conn. Supp. 211, 309 A. 2d 135, 143; *Brown* v. *State,* 565 P. 2d 697, 701 (Okla. Crim. App.); *State* v. *Anselmo, supra,* 256 So. 2d at 103–104.

3. Finally, other courts, among them the court below (A. 40), have observed that any claim of falsity in a search warrant affidavit, when raised in a pretrial suppression motion, is inherently suspect in view of the probative evidence of criminal activity uncovered by the search, but that, to the extent that the question of the affidavit's truthfulness is subject to relitigation, it involves essentially an issue of credibility of the government's proof that should best be left for trial. See, *e.g., State* v. *Williams,* 169 Conn. 322, 363 A. 2d 72, 76–77; *State* v. *Petillo, supra,* 61 N.J. at 177, 293 A. 2d at 655.

There are, we believe, satisfactory answers to each of these concerns. It does not disparage the important role played by the magistrate to suggest that his conclusions about an affiant's veracity should be reviewable. A magistrate's probable cause determination, after all, while entitled to some deference at a suppression hearing (*United States* v. *Ventresca,* 380 U.S. 102, 106, 109; *Aguilar* v. *Texas,* 378 U.S. 108, 111), has always been subject to later examination by trial and appellate judges, apparently without appreciable adverse effects upon magistrates' dedication, diligence, or morale. Indeed, there would appear to be even greater justification for permitting post-search challenges to an affidavit's accuracy than to its sufficiency: unlike the legal question of probable cause (which depends for its resolution solely upon a reading and evaluation of the face of the affidavit), an adequate inquiry into the truthfulness of the affiant's factual allegations often may not be feasible in a non-adversary proceeding or in the hurried atmosphere in which many warrants are issued. Moreover, even if such an inquiry could be made, a rule preventing any examination into the accuracy of the representations in an affidavit after a warrant has been issued would discourage magistrates from relying upon an affiant's facially credible factual assertions, surely an unwise development.

Nor can an absolute prohibition on such challenges be justified by considerations of administrative convenience. If, as we believe, challenges to the veracity of a search warrant affidavit are necessary to ensure

the realization of the deterrent purposes of the exclusionary rule, the desire to expedite pre-trial procedures, albeit legitimate, would not justify total preclusion of a forum in which to air these claims. But more important, the premise for this argument is faulty:

> First, 60 to 90 per cent of all defendants plead guilty, usually without a prior motion to suppress. Second, most searches are conducted without warrants, and the defendants in these cases now have full opportunity to file a suppression motion. Third, even in those few cases involving warrants, defendants can obtain a suppression hearing of limited scope, simply by asserting that the warrant's execution was unlawful. Hence, permitting defendants to controvert warrants would increase the present number of suppression hearings only insignificantly and merely add length to some hearings already granted.

Grano, A *Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury,* 1971 U. of Ill. L. F. 405, 417 (footnotes omitted). Moreover, it is by no means necessary that every allegation of a misrepresentation in a search warrant affidavit be permitted to spawn a protracted evidentiary hearing. As we discuss below (see pp. 30–33, *infra*), trial judges have a variety of tools to dispose of frivolous or insubstantial claims without a full-dress hearing. We know of no evidence indicating that those state and federal jurisdictions that have allowed defendants to attack the accuracy of search

warrant affidavits on a motion to suppress have experienced a deluge of time-consuming proceedings.[8]

Finally, it is no answer to the problem of inaccurate search warrant affidavits to suggest that the credibility question be left for trial. The affiant may not testify, and even if he does, the representations he made in order to obtain the warrant may be wholly irrelevant to the issue of guilt or innocence, in which event cross-examination on that subject would properly be foreclosed. What is more, once the court has determined to admit the evidence seized pursuant to the challenged warrant, the remedy to a defendant

[8] By the same token, there is little reason to believe that these administrative costs, even if slight, are unnecessary because the alternative sanction of civil or criminal proceedings against a police officer who has submitted a false affidavit would be a sufficient deterrent. See generally Sevilla, *The Exclusionary Rule and Police Perjury*, 11 San Diego L. Rev. 839 (1974). Even if available, and they may not be (*e.g.*, the false statement may not have been intentional), such alternative remedies have not been thought adequate to deter Fourth Amendment violations in other contexts. Although the exclusionary rule has been criticized as "a blunt instrument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large" (*United States* v. *Dunnings*, 425 F. 2d 836, 840 (C.A. 2) (Friendly, J.), certiorari denied, 397 U.S. 1002), and its utility has been severely questioned (see, *e.g.*, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 411–424 (Burger, C. J., dissenting)), it is the currently accepted response once evidence has been seized in violation of a defendant's Fourth Amendment rights. *Mapp* v. *Ohio*, 367 U.S. 643. Although we discuss below what we believe to be the proper limitations of the exclusionary rule in the context of false search warrant affidavits (see pp. 21–30, *infra*), we see no justification, so long as the exclusionary rule exists, for a blanket refusal to apply the remedy of suppression for such violations.

who has exposed the inaccuracy at trial will rarely be adequate.[9]

II. THE LEGAL SIGNIFICANCE OF A FALSE STATEMENT IN A SEARCH WARRANT AFFIDAVIT SHOULD BE ANALYZED IN LIGHT OF THE PURPOSES OF THE EXCLUSIONARY RULE

The conclusion that a defendant may not be totally precluded from attacking the accuracy of a search warrant affidavit does not suggest that every suppression motion charging a mistake or misrepresentation in the affidavit must result in an evidentiary hearing or that every showing that an affidavit contained a false statement must inevitably lead to the suppression of evidence. The right to challenge the veracity of the representations in a facially valid search warrant affidavit, we submit, is not automatic and unlimited.

This case may not be an appropriate vehicle in which to explore fully the limits of the right, because the courts below denied petitioner an evidentiary hearing, without any consideration of the nature of his claims, in the belief that "no attack upon the veracity of an underlying affidavit may be made" (A. 40). Nonetheless, it may prove helpful in the disposition of this case to provide a brief outline of the approach that we believe should be utilized to resolve this type of recurring problem.

[9] The related suggestion that the discovery of probative evidence in the course of execution of the warrant tends to substantiate the accuracy of the representations in the affidavit is incompatible with the settled doctrine that the legality of a search may not be sustained by what it in fact discloses. See *United States* v. *DiRe*, 332 U.S. 581, 595.

In our view, the contours of a defendant's right to obtain suppression of relevant, incriminating evidence seized pursuant to a facially sufficient search warrant because of a defect in the procedures that led to its issuance must be analyzed in terms of the policies underlying the Fourth Amendment exclusionary rule. A court should delve behind the face of a search warrant affidavit only in those instances where an alleged error in the affidavit has resulted "from an act or omission by a government agent which is objectionable in light of the purposes of the fourth amendment." Kipperman, *supra,* 84 Harv. L. Rev. at 831.

A. The judicially created exclusionary rule is designed to compel "respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217.[10] As the Court explained in

[10] The exclusionary rule has also been justified on principles of "judicial integrity" that make courts unwilling to become a "party to lawless invasions of the constitutional rights of citizens." *Terry* v. *Ohio*, *supra*, 392 U.S. at 12–13. See also *Elkins* v. *United States*, *supra*, 364 U.S. at 222. But those principles require "essentially the same [inquiry] as the inquiry into whether exclusion would serve a deterrent purpose." *United States* v. *Janis*, 428 U.S. 433, 458–459 n. 35. That is, principles of judicial integrity preclude the courts from admitting evidence where to do so would significantly encourage future invasions of constitutional rights. *Ibid.* The rationale of judicial integrity therefore does not constitute "an independent basis for excluding challenged evidence." *Michigan* v. *Tucker*, 417 U.S. 433, 450 n. 25. See also *Stone* v. *Powell*, 428 U.S. 465, 485; *United States* v. *Peltier*, 422 U.S. 531, 536–539; *United States* v. *Calandra*, 414 U.S. 338, 355–356 n. 11.

Michigan v. *Tucker,* 417 U.S. 433, 447:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.

Despite its broad deterrent purpose, however, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra,* 414 U.S. 338, 348. Recognizing that the suppression remedy is not "a personal constitutional right of the party aggrieved" (*id.* at 348) and that "if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice" (*Stone* v. *Powell,* 428 U.S. 465, 491), this Court on a number of occasions has declined to extend the exclusionary rule to situations in which the effectiveness of the sanction in deterring improper official conduct was outweighed by the significant social costs that the rule exacts—the suppression of relevant evidence of criminal activity. See, *e.g., Stone* v. *Powell, supra,* 428 U.S. at 489; *United States* v. *Janis,* 428 U.S. 433, 454; *United States* v. *Peltier,* 422

U.S. 531, 539; *United States* v. *Calandra, supra,* 414 U.S. at 351–352; *Alderman* v. *United States,* 394 U.S. 165, 171–172.

Determination of the exclusionary rule's usefulness in the context of misrepresentations in search warrant affidavits thus requires a balancing of the incremental deterrent value of suppression against the wisdom of applying a rule that "deflects the truthfinding process and often frees the guilty." *Stone* v. *Powell, supra,* 428 U.S. at 490.[11] This in turn demands a pragmatic assessment of the culpability of the police in presenting the false statement to the magistrate and the magnitude of the harm caused by the misconduct to the privacy rights of the defendant, *i.e.,* the materiality of the misrepresentation to the issuance of the warrant.[12]

[11] There must, of course, be a threshold finding that the Fourth Amendment has been violated before the appropriateness of applying the exclusionary rule may be considered. For example, erroneous statements in a search warrant affidavit as to matters not within the affiant's personal knowledge—such as allegations of criminality, related by a previously reliable informant, that turn out to be untrue—would not vitiate probable cause if the affiant had a substantial, reasonable basis for crediting the erroneous representations. See *United States* v. *Harris,* 403 U.S. 573; *United States* v. *Carmichael, supra,* 489 F. 2d at 989. This Court recognized as much in *Rugendorf* v. *United States, supra,* 376 U.S. at 533 (footnote omitted): "Petitioner's only challenges to the veracity of the affidavit are the two inaccurate facts mentioned above. Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant, they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant."

[12] Materiality here means only that the erroneous allegation was necessary to establish probable cause. See *Kipperman, supra,* 84 Harv. L. Rev. at 829 n. 35. To determine materiality, the court "excis[es] the misrepresentative parts from the affidavit and then examin[es] the residue for probable cause." *United States* v. *Thomas, supra,* 489 F. 2d at 668. Misstatements not essential to the probable cause showing subject those against whom the search was directed to no greater intrusion than the government was entitle to undertake, since the warrant presumably would have issued in the absence of any misrepresentation. It is for this reason that the exclusionary rule has not been held to require the suppression of evidence seized pursuant to a search warrant issued on the basis of an affidavit including tainted representations that were not necessary to the establishment of probable cause. See *United States* v. *Marchand,* C.A. 2, No. 77–1131, decided August 22, 1977, slip op. 5410–5411 (Friendly, J.) (collecting cases), pending on petition for a writ of certiorari, No. 77–775; *United States* v. *Grunsfeld,* 558 F. 2d 1231, 1239–1241 (C.A. 6), pending on petition for a writ of certiorari, No. 77–5271.

B. Application of the exclusionary rule obviously is most appropriate when law enforcement officers have engaged in intentional misconduct. In such cases the knowing and voluntary nature of the misrepresentation gives rise to a strong need for deterrence and at the same time promises that the suppression of evidence will tend to have the desired effect of preventing future transgressions. Suppression is also justified to further the "imperative of judicial integrity," since the misconduct involved is the deliberate deception of a judicial officer and the consequent subversion of the judicial process. See *Stone* v. *Powell, supra,* 428 U.S. at 484.

Indeed, so convincing is the argument in favor of suppression in cases of intentional misstatements in a search warrant affidavit (and so implausible the countervailing interests justifying such behavior) that

the exclusionary rule should be applied even if the falsified information is not necessarily material to the probable cause determination. Unless this sanction were available, there would be little to discourage unscrupulous police officers from appending untrue allegations to an affidavit in any close case in an effort to sway a hesitant magistrate. We agree with the First Circuit's observation in *United States* v. *Belculfine, supra,* 508 F. 2d at 63, that "[w]ere the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy in light of the remaining averments, enforcement officers would be placed in the untoward position of having everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy." To eliminate any incentive of the police to capitalize upon such tactics, evidence should be excluded if obtained as a result of a search warrant procured by use of an affidavit containing any "intentional, relevant, and nontrivial misstatement" (*ibid.*).[13]

[13] An alternative standard, articulated by some courts, bars evidence whose seizure is attributable to any misrepresentation "committed with an intent to deceive the magistrate." See, *e.g.*, *United States* v. *Thomas*, *supra*, 489 F. 2d at 669. A broader rule, requiring suppression in *every* instance of an intentional misrepresentation, would be unnecessarily costly, since law enforcement officers may occasionally include false statements in a search warrant affidavit in good faith and with no desire to subvert the Fourth Amendment (*e.g.*, a pseudonym may be used to protect the identity of a confidential informant). While such misrepresentations are not encouraged, they do not involve the same degree of culpability as do misrepresentations calculated either to obtain a warrant that should not be issued or to remove doubts about the existence of probable cause.

On the other hand, suppression of evidence attributable to wholly innocent misstatements, even material ones, would advance none of the interests protected by the exclusionary rule. See, *e.g.*, *United States* v. *Hole,* 564 F. 2d 298, 301 (C.A. 9); *United States* v. *Evers,* 552 F. 2d 1119, 1122 (C.A. 5); *United States* v. *Taxe, supra,* 540 F. 2d at 967. The law "cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan* v. *Tucker, supra,* 417 U.S. at 446. Where the erroneous official action was pursued in good faith, therefore, the deterrence rationale loses much of its force. *Id.* at 447.

More important, if the police officer had a well founded, objective belief in the accuracy of the facts he relayed to the magistrate, even if those facts were erroneous the Fourth Amendment itself would not have been offended. "It is true that the warrant will have been issued on inaccurate data, but the fourth amendment has been read not to proscribe 'inaccurate' searches, but rather only 'unreasonable' ones. And a warrant based on information which the affiant and the magistrate both had reasonable grounds for believing is a reasonable one." Kipperman, *supra,* 84 Harv. L. Rev. at 832 (footnote omitted). See *Brinegar* v. *United States,* 338 U.S. 160, 176; note 11, *supra.*

In between the polar extremes of intentional and innocent misrepresentations lie factual misstatements whose falsity, while not known to the affiant, could have been ascertained by the exercise of due care. Although the federal courts of appeals are in agreement that such misrepresentations should not lead to suppression if unnecessary to the establishment of probable cause, slightly different positions have emerged in the treatment of material misrepresentations. The majority of circuits have held that an unintentional material misrepresentation voids the warrant if made recklessly, but not if made merely negligently. See, *e.g., United States* v. *Collins,* 549 F. 2d 557, 561 (C.A. 8); *United States* v. *Lee, supra,* 540 F. 2d at 1209; *United States* v. *Rosenbarger,* 536 F. 2d 715, 720 (C.A. 6), certiorari denied, 431 U.S. 965; *United States* v. *Marihart, supra,* 492 F. 2d at 899–900; *United States* v. *Carmichael, supra,* 489 F. 2d at 989. Other circuits have suggested, however, that the deterrent purposes of the exclusionary rule would be better served by holding the warrant invalid even if the affidavit contained only a negligent misrepresentation of a material fact. *United States* v. *Astroff,* 556 F. 2d 1369, 1371–1372 (C.A. 5), rehearing *en banc* granted, 564 F. 2d 199. See also *United States* v. *Gonzalez,* 488 F. 2d 833, 837 (C.A. 2); *United States* v. *Harwood, supra,* 470 F. 2d at 324–325.

There is much to be said in favor of a rule requiring the suppression of evidence seized as a result of material misstatements that are included in an affidavit without regard for their accuracy. Reckless misstatements submitted to a magistrate in an effort to procure a search warrant are deserving of condemnation, are deterrable, and (when material) have directly contributed to a significant, unjustified governmental intrusion. Enforcement of the exclusionary rule in these circumstances would encourage law enforcement officers to make some effort to verify key facts before seeking a warrant and would add substantially to the privacy interests protected by the Fourth Amendment.

These arguments lose much of their force, however, when a misstatement is the product of simple negligence. While negligent conduct by police officers is avoidable in theory, in practice "no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further." *United States* v. *Carmichael, supra,* 489 F. 2d at 989. It would, in addition, be especially unfortunate if suppression of probative evidence of guilt were to depend upon the outcome of elaborate evidentiary hearings at which both sides would attempt—seldom, we suspect, with satisfactory results—to establish the degree of care that a hypothetical "reasonable policeman" would have exercised under the circumstances of a particular case or upon a judicial determination of a concept as subjective and slippery as "negligence."

Moreover, even assuming that exclusion of evidence in the case of a negligent misrepresentation might have some "incremental deterrent effect" (*United*

States v. *Calandra, supra,* 414 U.S. at 351), any marginal benefits would be "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Stone* v. *Powell, supra,* 428 U.S. at 494. All too often the rule would result in suppression where "[t]he disparity * * * between the error committed by the police officer and the windfall afforded a guilty defendant * * * is contrary to the idea of proportionality that is essential to the concept of justice." *Id.* at 490 (footnote omitted). Under no view of the realistic "balancing process" (*id.* at 488) required by the exclusionary rule do we think it appropriate to insist upon the suppression of evidence in such circumstances.

III. AN EVIDENTIARY HEARING ON A DEFENDANT'S CLAIM OF MISREPRESENTATION IN A SEARCH WARRANT AFFIDAVIT NEED NOT BE HELD IN THE ABSENCE OF SPECIFIC FACTUAL ALLEGATIONS WHICH SATISFY THE TRIAL JUDGE THAT A FURTHER INQUIRY IS REQUIRED

Although a defendant should be allowed to challenge the accuracy of the representations in a facially-valid search warrant affidavit, such claims may of course be dismissed without an evidentiary hearing if, accepted as true, they would not entitle the defendant to relief. Thus, under the principles outlined above, summary disposition of a motion to suppress would be appropriate if a defendant's claims amounted to nothing more than an allegation of an unintentional immaterial misrepresentation or of an innocent or negligent misrepresentation, whether or not material.

Even if a defendant's allegations state a claim for relief, however, the trial judge should not be required to grant a hearing if the suppression motion is supported solely by vague or conclusory assertions. It would be the rare defendant who could not invent a plausible claim of falsity in the search warrant affidavit (combined with an automatic allegation that the misstatement was intentional) in the hope that, by cross-examination of the affiant and the sources of the affiant's information, he might elicit statements that would either contradict the affidavit or provide useful discovery for trial.

Such "fishing expeditions" should be prohibited not only because they would embroil the courts in time-consuming and unnecessary pre-trial proceedings, but also because a search warrant affidavit is more than a mere pleading, the contents of which may be placed in issue by a simple denial. It is a sworn statement, generally by a law enforcement agent, that has been accepted as true and acted upon by a judicial officer. As such, as the federal courts have uniformly held, it is presumptively valid and may be called into question only by a preliminary showing of falsity. See *United States* v. *Scott,* 555 F. 2d 522, 528 (C.A. 5) (collecting cases), certiorari denied, No. 77–432, December 5, 1977.[14]

[14] This notion obviously is not limited to attacks upon search warrant affidavits. A defendant's entitlement to an evidentiary hearing on a motion for a new trial (see, *e.g.*, *United States* v. *Curry,* 497 F. 2d 99, 101 (C.A. 5), certiorari denied, 419 U.S. 1035; *United States* v. *Houle,* 490 F. 2d 167, 171 (C.A. 2), certiorari denied, 417 U.S. 970) or collateral relief (see *Blackledge* v. *Allison,* 431 U.S. 63, 75–76) is also dependent upon his making an initial demonstration that there is substance to his claim.

Because affidavits for search warrants will vary widely in their content, it is impossible to anticipate the different types of showings that would satisfy this standard. "[A]s it does so very often in procedural and evidentiary matters," the final decision must rest "within the good sense and experience of the district judge * * *." *Palermo* v. *United States,* 360 U.S. 343, 353. At a minimum, however, we believe that the burden must include the following: First, the defendant should be required to specify the precise information in the search warrant affidavit that he contends is false and to state whether the misrepresentation resulted from the intentional or reckless conduct of the government. Each of these contentions should be accompanied by a detailed statement of the reasons that support it. See *United States* v. *Scott, supra,* 555 F. 2d at 528.[15] Second, the defendant should be obliged to furnish affidavits or other sworn statements (*e.g.,* a transcript of testimony at another proceeding) of the major witnesses upon whom he will rely to prove his claim. See *United States* v. *Luna, supra,* 525 F. 2d at 6; *United States* v. *Carmichael, supra,* 489 F. 2d at 989. In cases where satisfaction of the affidavit requirement would be impractical (*e.g.,* where the defendant intends to call a hostile witness, such as a police officer), the defendant should inform the court of these difficulties and should submit an affidavit

[15] Cf. American Law Institute, *A Model Code of Pre-Arraignment Procedure, supra,* § SS290.3(1)(b) (evidence upon which a search warrant is issued may be contested "only upon preliminary motion, supported by affidavit, setting forth substantial basis for questioning the good faith of the testimony * * *").

setting forth the testimony that he expects to present at an evidentiary hearing to establish the falsity of the representations made to procure the search warrant.

Compliance with these procedures would not be unduly burdensome to defendants who entertain a good faith belief that a search warrant affidavit is inaccurate. Moreover, these requirements are not inflexible, and trial judges would have a wide measure of discretion to dispense with them in an appropriate case. But a defendant should have no constitutional right to an evidentiary hearing unless these reasonable prerequisites, which accommodate the interests of the Fourth Amendment with legitimate concerns for judicial economy, have been satisfied.

IV. THIS CASE SHOULD BE REMANDED FOR A DETERMINATION WHETHER PETITIONER'S BELATED, UNSWORN ALLEGATIONS WERE SUFFICIENT TO ENTITLE HIM TO AN EVIDENTIARY HEARING

At the oral argument on his suppression motion, petitioner challenged for the first time those portions of the search warrant affidavit of Detectives Brooks and Gray that represented that James Williams and Wesley Lucas of the Delaware Youth Center, where petitioner was employed, had told them that petitioner often dressed in clothing similar to that worn by Bailey's assailant. Petitioner asserted that Lucas and Morrison would testify at an evidentiary hearing that some of the statements attributed to them in the affidavit had never been made to the affiants and that the affiants had not accurately related others to

the magistrate (A. 16). Although it is arguable that the allegedly false statements were not essential to the establishment of probable cause,[16] the nature of the allegations of falsity suggests the possibility that the misstatements, if any, were made with an intent to deceive the magistrate into issuing the warrant.[17] If that suspicion were substantiated, the materiality of the false statements would be irrelevant under the standards we have proposed.

On the other hand, although petitioner's allegations of falsity were specific, they were neither made in his written motion to suppress nor supported by affi-

[16] As noted above (see p. 3, *supra*), the affidavit truthfully represented that petitioner had virtually admitted to the police that he had been involved in sexual activity with Bailey. Although at the suppression hearing petitioner objected to the use of this statement on the ground that it had been unlawfully obtained (A. 15), this contention was rejected by the trial judge and the Supreme Court of Delaware and petitioner did not preserve the issue in his petition for a writ of certiorari.

[17] Petitioner's counsel explained at the suppression hearing (A. 22-23): "The affidavit indicates that personal information, personal contact was made with certain witnesses and certain information was obtained. I intend to produce evidence that the person who said that did not personally contact those individuals at all, and I think this is not dealing with peripheral relevancy. As such, I feel that there may have been at least some misrepresentation to the Magistrate from what I have been told that in fact they didn't even contact that person. They may have had some other information a little bit different, but obtained through another police officer

davits or other evidentiary materials from persons with first-hand knowledge of the crucial events, even though there would appear to be no reason why such proof could not have been obtained. At thi juncture, however, there is no necessity for this Court to consider the adequacy of petitioner's pre-trial showing of falsity, because the trial judge based his denial of petitioner's request for an evidentiary hearing, not upon any defects in petitioner's proffer, but rather upon the erroneous legal conclusion that such a hearing was never required (A. 28). In these circumstances, we submit that the appropriate disposition is to remand this case with instructions to consider petitioner's request for an evidentiary hearing on his motion to suppress under the substantive and procedural principles discussed above.[18]

and they learned of it, but nevertheless apparently a misrepresentation to the Magistrate in the court below and I don't feel that is dealing with the peripheral relevancy.

"I think any magistrate would be extremely upset if a police officer gave him an affidavit and it turned out later that officer did not obtain that information personally like the way he said it was."

[18] A state is of course free as a matter of local practice to impose less restrictive guidelines than the ones we have suggested for determining whether a defendant's preliminary showing is sufficient to entitle him to an evidentiary hearing.

CONCLUSION

The judgment of the Supreme Court of Delaware should be vacated and the case remanded for further proceedings consistent with the views we have expressed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-5176

JEROME FRANKS,

Petitioner,

—v.—

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF DELAWARE

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

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JEROME FRANKS,
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v.
THE STATE OF DELAWARE,
Respondent

On Writ of Certiorari to the

Supreme Court of Delaware

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Counsel for the Petitioner has consented to the filing of this brief. */ Counsel for the respondent has refused consent.

---

*/ A copy of that letter is being filed with the Clerk.

The ACLU is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the Bill of Rights. Central among those rights are the privacy rights embodied in the Fourth Amendment.

The ACLU has participated in hundreds of cases involving those safeguards, including Mapp v. Ohio, 367 U.S. 643 (1961)(exclusionary rule), Camara v. Municipal Court, 387 U.S. 523 (1967)(probable cause requirement), and United States v. Chadwick, ___U.S.___, 53 L.Ed.2d 538 (1977)(warrant requirement).

The ACLU has a particular interest in this case because the privacy protections reaffirmed in Mapp, Camara, and Chadwick are directly threatened by the respondent's arguments. Essentially, respondent argues that courts need not entertain sub-facial challenges to the validity of search warrants, even when it is alleged, and there is reasonable basis to believe, that the warrant was obtained solely because of knowing and intentional misrepresentations made by police officers. Moreover, we think it important that the Court be provided with research that will not be submitted by either party, challenging the widespread assumption (accepted by the court below) that most courts prohibit sub-facial challenges to the veracity of search warrant affidavits. Finally, this amicus brief argues that this case can be resolved on a narrower ground than either party

will suggest.

In order to present this analysis, the ACLU respectfully moves for leave to file this amicus brief.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

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TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE
AMERICAN CIVIL LIBERTIES UNION,
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IN THE

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October Term, 1977

No. 77-5176

JEROME FRANKS,

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v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The American Civil Liberties Union is a nationwide, nonpartisan organization of over two hundred and fifty thousand members, dedicated to defending the principles embodied in the Bill of Rights to the Constitution.

Central among the protections of the Bill of Rights are the safeguards of privacy set forth in the Fourth Amendment.

In recent years, there have been substantial pressures to weaken the protections of the Fourth Amendment. The ACLU has repeatedly urged the Court to resist the "hydraulic pressures" Justice Douglas warned against in Terry v. Ohio, 392 U.S. 1, 39 (1968), pressures created largely by a perceived overemphasis on the "blunders of constables." This case, however, concerns not mere blunders but a deliberate, flagrant, and material misrepresentation in a sworn police affidavit requesting a search warrant. The right of all Americans "to be secure in their persons, houses, papers and effects" requires a rejection of this latest attack on the constitutional requirement that searches be conducted only on probable cause.

Statement of the Case

This case involves a trial court's refusal to allow a defendant at a state-created suppression hearing any opportunity (let alone a full and fair opportunity) to demonstrate that a facially sufficient affidavit submitted to a magistrate in support of a search warrant was intentionally and materially inaccurate, and that the portions of the affidavit that would remain after excising the intentional and material misrepresentations would not establish probable cause.

The Delaware Supreme Court affirmed, reasoning (1) that no need had been demonstrated for interfering with the magistrate's role in determining the reliability and credibility of affidavits, and (2) that the suppression hearing ought not be turned into an adjudication of guilt or innocence.

Question Presented

Whether the trial court erred in refusing to hear testimony at a suppression hearing which would have shown that material allegations in an affidavit made in support of a search warrant were intentional misstatements.

Summary of Argument

The defendant offered to prove that the search warrant authorizing an invasion of his privacy issued on the strength of an affidavit containing deliberate, intentional and material misstatements of fact. Accordingly, in resolving this case, the Court need not determine the consequences of innocent, negligent, or even reckless misstatements in probable cause affidavits, or the merits of applying the exclusionary rule when police have acted mistakenly, but in good faith.

The search in this case was unreasonable, and in violation of the Fourth Amendment, unless the warrant authorizing the search met the constitutional standard of probable cause. Although the facts on which a search warrant issues need not be accurate, the affiant must have probable cause, defined usually as "a reasonable ground for belief," to believe that they are accurate. Assuming the proffered testimony to be true, the affiants intentionally misstated facts to secure a warrant and therefore could not have had a reasonable belief in the truth of the facts asserted. The search was therefore conducted without probable

cause, in violation of the Fourth Amendment.

A magistrate's ex parte determination that the facts alleged in an affidavit constitute probable cause for a search warrant cannot insulate those factual allegations from subsequent review.

Delaware's refusal to allow the defendant to establish that evidence to be used against him at trial was seized in violation of the Fourth Amendment is inconsistent with Mapp v. Ohio, 367 U.S. 643 (1961) and Stone v. Powell, 428 U.S. 465 (1976). Settled Fourth Amendment law permits defendants to challenge the existence of probable cause for a warrantless search, or to challenge the execution of the search as violative of the warrant's provisions. None of the arguments commonly advanced against permitting sub-facial attacks on probable cause affidavits has merit, or justifies treating defendants who offer to prove that police-affiants intentionally misstated facts differently from defendants advancing other Fourth Amendment claims. No exigencies of law enforcement, or considerations of efficiency, require the immunization of deliberate misstatements in probable cause affidavits from impeachment. The magistrate's ex parte assessment of

credibility and reliability should be no more conclusive than his ex parte determination of reasonableness.

The arguments for permitting sub-facial attacks are so compelling that all eleven federal courts of appeal and, contrary to widespread belief, most state courts reaching the question permit such challenges in the circumstances alleged here.

Enforcement of the Fourth Amendment requires that defendants be permitted to establish intentional Fourth Amendment violations, and that evidence used against them in violation of the Fourth Amendment be excluded from their trials.

ARGUMENT

THE FOURTH AMENDMENT REQUIRES THAT DEFENDANTS BE AFFORDED AN OPPORTUNITY TO IMPEACH INTENTIONAL AND MATERIAL MISREPRESENTATION IN SEARCH WARRANT AFFIDAVITS.

Introduction

Assuming, as we must, the truth

of the testimony proferred but not received at the suppression hearing, Delaware's law enforcement officers clearly violated the defendant's Fourth Amendment rights.1/ Police officers established probable cause for a search warrant only by deliberately falsifying affidavits. The framers of the Fourth Amendment, who required that warrants be supported by sworn affidavits, did not intend to authorize invasions of personal privacy on the basis of falsely sworn affidavits.

Delaware's attempt to shade this category of Fourth Amendments violations from the disinfecting light of judicial review is particularly disturbing because this case does not raise the

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1/ The Delaware Supreme Court, like other courts which refuse defendants an opportunity to impeach false search warrant affidavits, did not dispute that petitioner's Fourth Amendment rights may have been violated; it simply declined to permit the violation to be established, or remedied, in the course of criminal proceedings.

difficult issues of Fourth Amendment remedies that have seriously divided the Court in recent years. Before turning to our arguments on the merits, we think it important to emphasize four issues this case does not raise, and which the Court need not resolve:

First, this case does not concern innocent errors of policemen unschooled in the intricacies of Fourth Amendment law, and it therefore provides no occasion to renew the troubled debate over application of the exclusionary rule when police officers have acted "mistakenly, but in good faith and on reasonable grounds." Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting).

Second, this case does not require examination of the deterrent value of the exclusionary rule on collateral review.

Third, this case raises no questions concerning the government's privilege to withhold the identities of informers, McCray v. Illinois, 386 U.S. 390 (1967), or the Fourth Amendment consequences of the negligent or even knowing use by law enforcement personnel of misrepresentations by informers to

establish probable cause.2/

Finally, because the defendant offered to prove that the police affidavit contained deliberate, intentional, and material misrepresentations,3/ the Court need not decide the Fourth

2/ Although the issue need not be resolved in this case, we note that problems relating to impeaching informer's statements are discussed in Herman, "Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit," 36 Ohio St. L.J. 721, 742-46 (1975) (hereafter cited as Herman).

3/ The trial court refused to permit petitioner's witnesses to state on the record what the substance of their testimony would be. See Appendix at 25-26. This Court must therefore rely on counsel's offer of proof. That offer plainly stated that the defendant would prove that the police deliberately and intentionally made false and material allegations in the affidavit in support of the search warrant. The materiality of the allegations in question has never been disputed by the state. The offer of proof is stated various ways, Appendix at 15, 16, 22-26. The substance of the offer is best summarized as follows:

Mr. Finocchiaro:
Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center, who I believe will give information that will intend [sic] to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.
The Court: That would be of what paragraph? Paragraph 15?
Mr. Finocchiaro: Yes. Paragraphs 15, 16 and 17.
The Court: And what they would testify to would rebut what is in Paragraph 15, 16 and 17?
Mr. Finocchiaro: Would rebut not only certain factual matters but also as to whether or not it was given and to whom it was given. . . .

Appendix at 16.

Amendment implications of innocent, negligent, or even reckless misstatements.4/ The issue presented to the

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4/ See, e.g., Robinson v. Kentucky, No. 77-362, cert. denied, Oct. 31, 1977, ____ U.S. ____, 46 U.S.L.W. 3286 (letting stand ruling that inadvertent misstatements can establish probable cause). The circuit courts have split on the culpability required for suppression. Compare, e.g., United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc) (invalidating only intentional and reckless misstatements, where material) with United States v. Thomas, 489 F.2d 664 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1975) (leaving open the possibility that material negligent misstatements would invalidate warrant). The issue is canvassed in Herman, supra n.2 at 746-50. Because the petitioner offered to prove that the affidavit contained material, intentional misstatements, and because a concrete factual setting is especially important to analyze the Fourth Amendment implications of sworn allegations where the affiant's belief in their truth is not reasonable, we urge the Court to decide only the narrow issue here presented. We note, however, the similarity of the Fourth Amendment's

Court is a narrow one, involving an extremely serious claim that the police deliberately submitted false affidavits. This case thus presents the paragidmatic situation of officials whose intentional misconduct violates the constitutional rights of defendants, and the integrity of the courts. The sharpest critics of the exclusionary rule have indicated they would preserve it for just such deliberate and flagrant violations of settled Fourth Amendment rights. See, e.g., Brewer v. Williams, ___ U.S. ___ (1977), 51 L.Ed.2d 424, 450 (Burger, J., dissenting); Stone v. Powell, 428 U.S. at 538 (White, J., dissenting). All

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reasonableness standard with the "reasonable man" negligence standard of the law of torts, suggesting that statements negligently made - that is, made without a reasonable degree of care - cannot amount to probable cause, which implies a "reasonable ground for belief." See, Brinegar v. United States, 338 U.S. 160, 175 (1949). Throughout this brief, unless otherwise indicated, we will interchangeably use "misrepresentations" and "misstatements" in the meaning this case presents - statements which are intentionally and deliberately falsely sworn.

eleven federal courts of appeal, and, contrary to widespread belief, most state courts considering the question, are agreed that, in the circumstances alleged below, sub-facial attacks on the veracity of search warrants must be permitted.5/ Immunization of falsely sworn probable cause affidavits from impeachment at or prior to trial would remove a critical deterrent to official falsehood, would nullify the Fourth Amendment's requirement that warrants issue only on probable cause, and would destroy a significant portion of the right of privacy the Fourth Amendment was designed to secure.

A. A Search Pursuant to a Warrant Based on Intentional and Material Misrepresentations is a Search Without Probable Cause, in Violation of the Fourth Amendment.

The Fourth Amendment contains both a guarantee of individual privacy against unreasonable searches and

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5/ See infra nn. 22-27.

seizures,6/ and a mechanism to implement that guarantee. It is now "axiomatic" that the warrant requirement, designed to insure that invasions of privacy are undertaken only on the constitutionally required showing of probable cause, is critical to the protection of individual privacy.7/ This Court has consistently recognized that the essence of the protection afforded by the Fourth Amendment lies in the determination by a disinterested magistrate that probable cause exists. 8/

6/ Feldman v. United States, 322 U.S. 487, 489-90 (1944); see also Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

7/ Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring).

8/ E.g., United States v. United States District Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 528-29 (1967); Johnson v. United States, 333 U.S. 10, 13-14 (1948). South Dakota v. Opperman, 328 U.S. 364 (1976), and United States v. Ramsey,

The probable cause requirement embodies the constitutional judgment that searches are reasonable only when the law enforcement officer has a reasonable belief that items seizable by virtue of connection with criminal activity will be in the place to be searched.9/ The probable cause requirement, together with the Fourth Amendment's command of particularity and its warrant requirement, protect the privacy of innocent persons, and the privacy of arguably guilty persons in matters unrelated to crimes for which

U.S.____(1977), 52 L.Ed.2d 617 (1977) are not to the contrary. In both those cases, the Court justified warrantless searches on less than probable cause because the searches were in non-criminal contexts and were "unrelated to the criminal investigative-enforcement process." See, e.g., South Dakota v. Opperman, 428 U.S. at 370 n.5. This Court's decisions uniformly hold that a search in the circumstances of this case is unconstitutional unless based on probable cause.

9/ United States v. Old Dominion Warehouse, 10 F.2d 736 (2d Cir. 1926) (Hand, J.).

the police have probable cause to search.10/ Chimel v. California, 395 U.S. 752, 767 n.12 (1969).

The constitutional judgment that searches are permissable only on "probable cause" does not brand searches as unreasonable whenever facts relief on by the officer or by the magistrate turn out on later examination to be incorrect:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949). See also, Gerstein v. Pugh, 420 U.S. 103, 112 (1975).

10/ See Herman, supra n.2, at 742-46.

Nonetheless, under the probable cause standard, which the Court has described as a "minimum requirement,"11/ a warrant cannot issue unless a law enforcement officer has a reasonable belief that the facts warrant a search12/ and, lacking exigent circumstances, submits the facts on which he relies for objective determination by a disinterested magistrate. Johnson v. United

11/ "The Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." Chambers v. Maroney, 399 U.S. 42, 51 (1970). See also, United States v. Ortiz, 422 U.S. 891, 896 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 269-70 (1973); Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

12/ In Dumbra v. United States, 268 U.S. 435 (1925), the Court indicated that an affiant must himself have a reasonable belief in the truth of the facts asserted in the probable cause affidavit:

> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds

States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452 (1932). Accordingly, although an officer's good faith belief that probable cause exists may be a factor in determining whether he can be held liable in damages for a search conducted without probable cause (e.g., Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347-48 (2d Cir. 1972), on remand from 403 U.S. 388 (1971)) an officer's (or magistrate's) good faith belief that probable cause existed cannot justify a search where probable cause did not in fact exist. Hill v. California, 401 U.S. 797, 804 (1971). Instead, the Court has consistently held that evidence seized in the course of searches for which probable cause has not been properly established must be suppressed, both when the magistrate wrongly assessed the sufficiency of the affidavits presented, Aguilar v. Texas, 378 U.S. 108 (1964), and when a warrantless arrest or search lacked the necessary probable

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> at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched.

268 U.S. at 441 (emphasis added).

cause, Whitely v. Warden, 401 U.S. 560, 566-69 (1971).

Thus, in Whitely v. Warden, a magistrate issued an arrest warrant on the strength of a facially insufficient affidavit. Upon hearing a bulletin announcing issuance of the warrant, an officer arrested the defendant, searched him and found incriminating items. After this Court held that the arrest warrant was facially insufficient, and that the search incident to that arrest was therefore invalid, it rejected as well the state's argument that the search was a reasonable warrantless search because the arresting officer acted reasonably, and therefore constitutionally, in relying on the radio bulletin:

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the

arrest.13/

401 U.S. at 568.

Similarly, lower courts have consistently read Whitely to require probable cause, not simply an officer's reasonable belief that probable cause exists, to justify a warrantless search under exigent circumstances.14/

13/ Apparently, the Court's holding on this point was unanimous. None of the dissenters in Whitely argued that an arrest lacking probable cause could be found constitutional because of the reasonableness of reliance on a warrant based on an insufficient affidavit; Justice Black's dissent contended instead that the arresting officer had probable cause to arrest, independent of the warrant which Justice Black assumed, arguendo, to be invalid.

14/ E.g., Weeks v. Estelle, 509 F.2d 760 (5th Cir. 1975); United States v. Murray, 492 F.2d 178, 188 (9th Cir. 1973).

The Court's approach in Whitely is precisely the approach required by the Fourth Amendment in this case:

> Certainly [a magistrate is] entitled to assume that the officers requesting aid offered [him] the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal [search] cannot be insulated from challenge by the decision of the [magistrate] to rely on [information supplied by the officers].

It is settled that a magistrate's unreasonable inference drawn from facts which officers reasonably believe cannot justify a search when those facts do not establish probable cause; yet Delaware here urges that a magistrate's reasonable inference from facts which officers do not reasonably believe should somehow suffice. This result is entirely inconsistent with the Fourth Amendment. As a leading commentator has written:

> It is true that, of the various functionaries who participate in the probable-cause and warrant-issuing

processes, the magistrate is supposed to play a unique role. The assumption underlying the warrant clause of the fourth amendment is that innocent privacy will be jeopardized if the probable-cause process (the very core of the fourth amendment) is entrusted solely to law enforcement officers who, ". . . in the often competitive enterprise of ferreting out crime," are likely to draw every inference and resolve every doubt in favor of taking intrusive action. To safeguard innocent privacy, we therefore insist that a "neutral and detached" magistrate draw the inferences and resolve the doubts. But the importance of this function should not blind us to the fact that it is only a part of the probable-cause process, and the final part, at that. The antecedent parts are the acquisition and transmission of the very information that the magistrate must evaluate. These parts cannot feasibly be administered by the magistrate and must therefore be entrusted to law enforcement officers. That we assign

different parts of the probable-cause process to different functionaries is hardly reason for viewing either the parts or the functionaries in isolation. It does not trivialize the magistrate's inference-drawing task to say that it is no more important than the officer's task of acquiring information and transmitting it to the magistrate. Indeed, it makes utterly no sense to ask only whether the magistrate drew a reasonable inference without asking whether the information from which he drew the inference was acquired carelessly or transmitted inaccurately. Probable cause and its process are a whole. If any part is defective, if any functionary performs improperly, the whole fails, thereby increasing the risk of invading privacy and subverting the fourth amendment's primary value.

When a court is concerned only with whether the magistrate had probable cause (that is, whether the magistrate properly performed his role), it indicates either that it does not understand the multifaceted nature of probable

cause and its process or that it does not understand that each part is as important as any other. Sub-facial attacks are intended to expose the malfunctioning of the law-enforcement part, but no less to assert the total failure of probable cause and the consequent risk to innocent privacy. When a court prohibits sub-facial attacks by dropping an iron curtain between magistrate and affiant, it fragments the process to such an extent that the sum of the parts no longer equals the whole. To the same extent it diminishes the protection that innocent privacy is constitutionally entitled to receive.

Herman, supra n.2, at 739-40 (footnotes omitted).

B. Sub-facial Challenges Alleging Intentional Misstatement Should Be Permitted.

Just two years ago, seven members of this Court agreed that the Fourth Amendment requires "implementation of the exclusionary rule at trial and its

enforcement on direct appeal of state-court convictions." Stone v. Powell, 428 U.S. 465 (1976).15/ Even the two Justices who would have abolished the exclusionary rule where "the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief" noted that it should be enforced in cases, such as this case, where the police acted without a reasonable, good-faith belief that their actions were permissable. Stone v. Powell, 428 U.S. at 538 (White, J., dissenting); Id., at 501-502 (Burger, J., concurring).16/

15/ The exclusionary rule was applied last Term in United States v. Chadwick, ___U.S.___, 53 L.Ed.2d 538 (1977).

16/ This distinction, which rests on such cases as Elkins v. United States, 364 U.S. 206 (1960), Olmstead v. United States, 277 U.S. 438 (Brandeis and Holmes, JJ., dissenting), has been justified by Professor Wright as follows:

> It is demeaning to the Courts and to the legal system if convictions can rest on blatant disregard by the police of the constitutional rights of our people.

Delaware's refusal to allow testimony at the suppression hearing which would have established that the affidavits contained intentional and material misstatements was inconsistent wtih Stone, which held that states are required to determine whether evidence to be used at trial was seized in violation of the Fourth Amendment. United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976).

As we shall now demonstrate, none of the commonly advanced arguments against permitting sub-facial challenges has merit. There is no principled justification for treating the violation of petitioner's Fourth Amendment rights differently from other search and seizure challenges, all of which can be considered at trial and on direct review.

1. There are no compelling reasons for prohibiting sub-facial challenges.

a. The importance of the violation.

Wright, "Must the Criminal Be Free if the Constable Blunders?," 50 Tex. L. Rev. 736, 744 (1972).

First, petitioner's claim is at least as threatening to Fourth Amendment values as are other claims which settled law requires courts to hear. It is instructive to compare the defendant's situation under the rule adopted by the Delaware Supreme Court with that of three hypothetical defendants. Defendant A moves to suppress evidence seized in a warrantless search which police claim was incident to a lawful, but warrantless, arrest.17/ Defendant B moves to suppress evidence which police claim was seized in hot pursuit.18/ Defendant C moves to suppress evidence seized pursuant to a valid warrant on the ground that the evidence was seized upstairs (which the police deny) and the warrant only authorized a downstairs search. Defendants A, B, and C are entitled to present witnesses at a suppression hearing to prove that the facts were not as the police asserted. But under the decision below, petitioner could not present witnesses to prove that the facts were not as the police alleged, even though the police had

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17/ Cf., McCray v. Illinois, 386 U.S. 300 (1967).

18/ Cf., Warden v. Hayden, 387 U.S. 294 (1967).

falsely and intentionally sworn to those facts before a magistrate, and had thereby abused and corrupted the judicial process. As Judge Friendly has observed, "the objectives [of the Fourth Amendment] are not accomplished if the judicial officer is put upon by the police." United States v. Dunnings, 425 F.2d 836, 840 (2d Cir. 1969). Surely intentional misstatements that are used to perpetuate a fraud upon the courts are a greater threat to Fourth Amendment values than the police conduct at issue in hypotheticals A, B, and C. It follows that the conduct at issue in this case must be subject to at least the same degree of judicial review as is presently available in hypotheticals A, B, and C.

b. Exigencies of law enforcement.

No exigencies of law enforcement, or meaningful considerations of efficiency, require the immunization of false probable-cause affidavits. This is not a case, like Terry v. Ohio, 392 U.S. 1 (1968) or Chambers v. Maroney, 399 U.S. 42 (1970), where compelling law enforcement needs justify striking a new balance of Fourth Amendment "reasonableness." The only practical effect which sub-facial challenges to false affidavits can have on police behavior is to deter intentional

misrepresentations. States are already under an obligation to hear Fourth Amendment claims, which often require witnesses. These claims are currently resolved at suppression hearings, or at trial, as a matter of course. Accordingly, permitting sub-facial challenge to allegedly intentional police misstatements would not require the creation of a new judicial mechanism, would not unduly strain judicial resources, and would not create new rules that might confuse or complicate law enforcement efforts.

c. The magistrate's function.

Requiring trial courts to afford defendants an opportunity to challenge search warrant affidavits would not interfere with or demean the magistrate's function. Although the court below mentioned in passing that a magistrate's function includes weighing the credibility and reliability of search warrant affidavits, it did not rule, as a matter of state or federal law, that a magistrate is required to conduct an independent investigation of the truth or falsity of factual allegations in the affidavits. And there is no indication in the record of this case that such an investigation was, in fact, conducted. To the contrary, no witnesses were called or

examined, no transcript was made, and the warrant issued almost immediately. Furthermore, even if there had been some investigation, it is impossible fully to assess credibility and reliability in an ex parte hearing.19/

19/ The experience of other courts strongly suggests that falsified warrants frequently slip past magistrates. See, e.g., United States v. Harwood, 470 F.2d 322, 324-25 (10th Cir. 1972); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972); United States ex rel. Petillo v. New Jersey, 400 F. Supp. 1152 (D.N.J. 1975), vacated, 541 F.2d 275, reinstated, 418 F. Supp. 686 (1976); State v. Spero, 371 A.2d 1155 (N.H. 1977). For this reason, the American Law Institute recommends that challenges to the veracity of probable cause affidavits should be permitted:

> The reason is that the proceeding before the issuing magistrate is ex parte; the record made before him is not of the same probative value as the record of a trial, and is therefore not entitled to be treated like a record on appeal. To put the matter another way, what is 'right' for an issuing magistrate to do on the basis of an ex parte record may not be what is right for the court to do on the basis of an adversary proceeding on motion to suppress. To conclude otherwise, and immunize the warrant fair on its face from factual challenge, would be to preserve pro tanto the ex parte character of the proceeding on issuance.

ALI, Model Code of Pre-Arraignment Procedure, Part II - Commentary, SS § 290.3 at 570 (1975). The relevant statutory provision is Part II-Statute, SS § 290.3. As this Court stated in Alderman v. United States, 394 U.S. 165, 183-84: "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity . . . will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands."

The basic point, however, is that ordinarily the ex parte review by the magistrate does not involve a hearing. Because of the need for speed, most warrants issue almost immediately, as a matter of course.20/

Furthermore, even if a magistrate has conducted an ex parte review or hearing, permitting a subsequent plenary review is not at all unseemly or unnecessary.21/

20/ One important function of probable cause affidavits may be to establish and "freeze" a record upon which the existence of probable cause can later be decided at an adversary hearing. Jones v. United States, 6 Crim. L. Rptr. 2124 (D.C. Cir. 1964), rev'd on rehearing on other grounds sub nom. Dorman v. United States, 435 F.2d 385 (D.D. Cir. 1970) (Leventhal, J.); Miller and Tiffany, "Prosecutor Dominance of the Warrant Decision," 1964 Wash. U.L.Q. 1, 13 (1964).

21/ An issuing magistrate seldom inquires into the truth of a facially sufficient affidavit. Consequently it is inaccurate to treat a sub-facial attack at a suppression hearing as a review of the issuing magistrate's decision. Rather, it is an inquiry of first in-

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stance. Finally, the defendant is permitted, at a suppression hearing, to attack the facial sufficiency of the affidavit even though the issuing magistrate has already resolved that issue. If the suppression judge agrees with the defendant, he is saying that the magistrate erred on a matter of law in issuing the warrant -- that is, that he stupidly or unreasonably issued it. Can it be more unseemly if the suppression judge holds that the magistrate was deceived by a facially sufficient, but untrue, affidavit?

Herman, supra n.2, at 721, 724-25 (1975). As for the Delaware Supreme Court's contention that the falsity of affidavits properly belongs to trial on the merits because "neither the probable cause nor suppression hearings are adjudications of guilt or innocence," with all respect we are at a loss to understand what this means. See Herman, supra n.2, at 725, text accompanying notes 23-24. Although the veracity of the search warrant affidavits may conceivably be relevant at trial for the purpose of undermining the credibility of the affiant, if he

d. The experience of other jurisdictions.

Most courts faced with this issue have recognized that compelling Fourth Amendment considerations require that defendant be permitted to challenge search warrant affidavits. In a rare display of unanimity, each of the

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testifies, it has a wholly different and crucial relevance at the probable cause or suppression hearing: namely, to negative the existence of probable cause, thereby resulting in suppression of seized evidence. Although it is not the function of criminal proceedings to punish Fourth Amendment violations, the Fourth Amendment is designed to restrain police from unreasonably invading privacy in their search for evidence to be used at a criminal trial.

federal courts of appeal has either held,22/ or indicated that it would

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22/ United States v. Belculfine, 508 F.2d 58, 63 (1st Cir. 1974); United States v. Gonzalez, 488 F.2d 837-38 (2d Cir. 1973) (by implication); United States v. Pond, 523 F.2d 210, 213, 214 (2d Cir. 1975) (by implication), cert. denied, 423 U.S. 1058 (1976); King v. United States, 282 F.2d 398, 400-01 (4th Cir. 1960); Wrenn v. North Carolina, 486 F.2d 1399 (4th Cir. 1973) (mem.), cert. denied, 417 U.S. 973 (1974); United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1975); United States v. Luna, 525 F.2d 4, 8 (6th Cir. 1975), cert. denied, 424 U.S. 965 (1976); United States v. Carmichael, 489 F.2d 983, 988-89 (7th Cir. 1973) (en banc); United States v. Marihart, 492 F.2d 897, 899-900 (8th Cir.), cert. denied, 419 U.S. 827 (1974); United States v. Damitz, 495 F.2d 50, 54 (9th Cir. 1974); United States v. Harwood, 470 F.2d 322-24 (10th Cir. 1972).

hold when the opportunity arose, 23/ that sub-facial challenges to probable cause affidavits must be permitted. And, contrary to widespread belief,24/ a majority of the state courts that have considered the question either

23/ United States v. Armocida, 515 F.2d 29, 40-41 (3d Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Thornton, 454 F.2d 957 (D.C. Cir. 1971). Leading district court opinions include United States ex rel. Petillo v. New Jersey, 400 F. Supp. 1152 (D.N.J. 1975), vacated, 541 F.2d 275 (3rd Cir. 1976), reinstated, 418 F. Supp. 686 (1976) (Stern, J.); United States v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966) (Frankel, J.).

24/ E.g., North Carolina v. Wrenn, 417 U.S. 973, 975 (1974) (White, J., and Burger, C.J. dissenting), denying cert. to 486 F.2d 1399 (4th Cir. 1973); Kipperman, "Inaccurate Search Warrants as a Ground for Suppressing Evidence," 84 Harv. L. Rev. 824 (1971).

permit such challenges,25/ or have implied, by holding that the necessary

25/ Cases unequivocally holding that facially sufficient affidavits may be impeached are collected in Comment, "Challenges to the Veracity of Facially Sufficient Warrants--Is the Truth Relevant?," 7 Seton Hall L. Rev. 827, 843 n.92 (1976)[hereinafter cited as Comment] as follows:

"McConnell v. State, 48 Ala. App. 523, 527-28, 266 So. 2d 328, 332-33 (Crim. App. 1972); Davenport v. State, 515 P.2d 377, 380 (Alas. 1973); State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974); State v. Melson, 284 So. 2d 873, 874-75 (La. 1973); Commonwealth v. Hall, 451 Pa. 201, 204, 302 A.2d 342, 344 (1973); State v. Sachs, 264 S.C. 541, 556, 216 S.E.2d 501, 509 (1975); State v. Manly, 85 Wash. 2d 120, 530 P.2d 306, cert. denied, 423 U.S. 855 (1975)."

As of 1976, four states permitted impeachment as a matter of statutory interpretation, Comment at 843 n.94:

"Theodor v. Superior Court, 8 Cal. 3d 77, 90, 501 P.2d 234, 243, 104 Cal. Rptr. 226, 235 (1972)(en banc); People v. Alfinito, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965);

threshold showing to warrant a hearing had not been made, that they would permit challenges on proper showings,26/

State v. Wright, 511 P.2d 1223, 1225-26 n.3 (Ore. 1973)(en banc); State v. Bankhead, 30 Utah 2d 135, 138, 514 P.2d 800, 802 (1973)."

Amicus has found three more states that have joined the growing movement toward permitting sub-facial attacks: O'Bean v. State, 184 So. 2d 635, 638-39 (Miss. 1966); State v. Luciow, 240 N.W.2d 833, 837 (Minn. 1976); State v. Spero, 371 A.2d 1155 (N.H. 1977). The Alabama Supreme Court has let stand the lower court ruling cited above, 289 Ala. 746, 266 So. 2d 334 (1973).

26/ Cases upholding warrants against sub-facial challenges on the ground that any alleged or demonstrated inaccuracies were either unintentional, immaterial, or both, are collected in Comment, supra n.25, at 843 n.93 as follows:

"State v. Sabari, 109 Ariz. 553, 555-56, 514 P.2d 474, 476-77 (1973); Williams v. State, 232 Ga. 213, 213-14, 205 S.E.2d 859, 860 (1974); State v. Baca, 84 N.M. 513, 515, 505 P.2d 856, 858 (1973); State v. Vance, 25 N.C. App. 92, 94,

A lesser number of states flatly prohibit such challenges, or have older court decisions which indicate that such challenges might be prohibited.27/

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212 S.E.2d 249, 250, cert. denied, 287 N.C. 264, 214 S.E.2d 436 (1975); State v. Dodson, 43 Ohio App. 2d 31, 36, 332 N.E.2d 371, 375 (1974); Scott v. State, 73 Wis. 2d 504, 243 N.W.2d 215 (1976). See also State v. Koucoules, 343 A.2d 860, 864-65 n.3 (Me. 1974)."

One more state court has implied that impeachment would be permitted on a proper showing: State v. Sanders, 222 Kan. 189, 563 P.2d 461, 466-67 (1977) (alternate holding).

27/ States which deny opportunity to impeach facially sufficient warrants are collected in Comment, supra n.25, at 843 n.95 as follows:

"Liberto v. State, 248 Ark. 350, 356-57, 451 S.W.2d 464, 463 (1970) (alternative holding); State v. Anonymous, 30 Conn. Supp. 211, 219, 309 A.2d 135, 147 (Super. Ct. 1973); People v. Bak, 45 Ill. 2d 140, 146, 258 N.E.2d 341, 344, cert. denied, 400 U.S. 882 (1970);

Caslin v. Commonwealth, 491 S.W.2d 832, 834 (Ky. 1973); Tucker v. State, 244 Md. 488, 499-500, 224 A.2d 111, 117-18 (1966), cert. denied, 386 U.S. 1024 (1967); State v. Petillo, 61 N.J. 165, 178-79, 293 A.2d 649 (1972), cert. denied, 410 U.S. 945 (1973); Owens v. State, 217 Tenn. 544, 553, 399 S.W.2d 507, 511 (1965). See also State v. English, 71 Mont. 343, 347-48, 229 P. 727, 729 (1924) (dictum).

"Additionally, there are a number of state cases that can be interpreted as prohibiting inquiry into the underlying truth of statements in a search warrant affidavit, but it is not clear whether they specifically involved challenges to the truth of an affiant's statements. It appears that in these cases the defense was objecting to the conclusory nature of the affiant's statements, rather than attempting to challenge their underlying truth. See, e.g., Seager v. State, 200 Ind. 579, 581-82, 164 N.E. 274, 275 (1928); State v. Brogioni, 320 Mo. 202, 206-07, 7 S.W.2d 262, 263 (1928); Baker v. State, 448 P.2d 282, 283 (Okla. Crim. App. 1968); State v. Seymour, 46 R.I. 257, 258-60, 126 A. 755, 756 (1924)."

See also Phenix v. State, 488 S.W.2d

There is therefore widespread judicial recognization that the Fourth Amendment requires states to permit defendants to challenge facially sufficient search warrants. That fact, together with universal approval by commentators,28/

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759 (Tex. Cr. App. 1973). Amicus notes that Connecticut and Oklahoma have recently reaffirmed their holdings. State v. Williams, 169 Conn. 322, 363 A.2d 72 (1975); Brown v. State, 565 P.2d 697 (Okla. Cr. App. 1977).

The breakdown of state jurisdictions considering the issue is therefore as follows: fourteen states permit challenge; eight have implied that they would permit challenge on a proper showing; as few as nine, or as many as thirteen, prohibit sub-facial attacks.

28/ E.g., Forkosh, The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment, 34 Ohio S.L.J. 297 (1973); Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury, 1971 U. Ill. L.F. 405; Herman, Warrants for Arrest or Search: Impeaching the Allegations of a Facially

Sufficient Affidavit, 36 Ohio S.L.J. 721 (1975); Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 824 (1971); Mascolo, Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity, 44 Conn. B.J. 9 (1970); Comment, Challenges to the Veracity of Facially Sufficient Warrants - Is the Truth Relevant?, 7 Seton Hall L. Rev. 827 (1976); Comment, Controverting Probable Cause in Facially Sufficient Affidavits, 63 J. Crim. L.C. & P.S. 41 (1972); Comment, The Outwardly Sufficient Affidavits: What If It's False?, 19 U.C.L.A.L. Rev. 96 (1971); Note, Search Warrant Affidavits - The Constitutional Constraints, 23 Drake L. Rev. 623 (1974).

demonstrates that such challenges can be permitted without impairing legitimate state interests.29/

29/ Cf., Chimel v. California, 395 U.S. 752, 769 (1969) (Harlan, J., dissenting).

Some courts have held that although the Fourth Amendment requires sub-facial challenges, the costs in terms of judicial time and energy justify limiting such challenges to defendants who make a sufficient preliminary showing. E.g., United States v. Belcufine, 508 F.2d 58 (1st Cir. 1974); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973)(en banc); United States v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966). See also, Model Code of Pre-Arraignment Procedure, SS § 290.3(1)(b) (1975). The arguments against such a requirement, or at least against its most severe forms, are convincingly presented by Professor Herman, supra n.2, at 721, 756-59 (1976). However, because the offer of testimony made by petitioner at the suppression hearing plainly satisfies the most demanding standards suggested, the Court need not and should not decide on this record whether states may deny hearings on lesser showings. Amicus urges the Court to defer ruling

2. Compelling Fourth Amendment considerations support sub-facial challenges.

If, as we have argued, a warrant which issues on the basis of material and intentional misstatements cannot justify a search, then settled law requires that evidence seized in that search cannot be introduced against the defendant at trial. Mapp v. Ohio, 367 U.S. 643 (1961); Stone v. Powell, 428 U.S. 493 (1976). Although this case does not directly involve the exclusionary rule itself, we think it important to emphasize that the exclusionary rule is directed not only at illegal police conduct, but also at the violation of constitutional liberties by the entire criminal justice system. Thus, the exclusionary rule is not a sanction directed solely at

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on that issue until it has the benefit of wider experience under a variety of state rules. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1937) (Brandeis, J., dissenting). Cf., Shaefer, "The Fourteenth Amendment and Sanctity of the Person," 64 N.W.U.L. Rev. 1, 7-11 (1969).

the individual police officer, either by its terms or by its effect. The rule exists to enforce the Fourth Amendment throughout the criminal justice system, from the officer on the beat, to the prosecutor, to the trial judge. Weeks v. United States, 232 U.S. 383, 391-92 (1914).

A leading law review article on the exclusionary rule has pointed out that courts and police officers are not

> moral strangers . . . but . . . parts of the same government and parties to the same governmental course of conduct and, indeed, neither a criminal court nor a law enforcement officer makes sense in isolation of the other. A criminal court is not an intelligible institution without the expectation that it will receive evidence from which to synthesize verdicts and judgments. By the same token, a policeman--e.g., the marshal in Weeks--may be out in the field, but his being out there in a law enforcement, as opposed to some administrative, capacity is only intelligible on the expectation that he will come in to court.

Thomas S. Schrock and Robert C. Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251, 300 (1974).

The Fourth Amendment requires probable cause at every stage of the criminal justice process. As Professor Herman has observed:

> . . . In a case involving a warrant, the process has three parts: acquisition of information, transmission to a magistrate, and evaluation by the magistrate. Each part, no less than the others, plays a vital role in serving fourth amendment goals.

Facial attacks-the validity of which has never been questioned-assert the malfunctioning of the evaluation part. Sub-facial attacks implicate the other parts, primarily transmission. Given the equally crucial role played by each part, sub-facial attacks should, as a matter of fourth amendment law, be permitted without restriction, for they go to the very heart of the protection of privacy. Prohibiting sub-facial attacks or

> imposing restrictions that are functionally equivalent to prohibition "reduces the Fourth Amendment to a form of words."

Herman, supra n.2 at 760, citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

CONCLUSION

In the circumstances of this case, the Court below erred in denying the defendant an opportunity to challenge the veracity of material allegations in an affidavit used to establish probable cause to search.*

Respectfully submitted,

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